Supreme Court, U.S.
FILED
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No._____

In The
Supreme Court of the United States
October Term 1997

Arizonans for Official English and Robert D. Park,
Petitioners

v.

State of Arizona; Jane Dee Hull, Governor of Arizona; Grant Woods, Attorney General of Arizona; Armando Ruiz; Linda Aguirre; John Philip Evans; Rosie Garcia; Candido Mercado; Manuel Pena, Jr.; Peter Rios, Jr.; Macario Saldate IV; Federico Sanchez; and Victor Soltero
Respondents

On Petition for A Writ of Certiorari to the Supreme Court of the State of Arizona

PETITION
for Writ of Certiorari

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July 23, 1998

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QUESTION PRESENTED

Article XXVIII of the Arizona Constitution declares English the official language of Arizona and requires all governmental actions to be taken in English. In *Arizonans for Official English v. Arizona*, No. 95-974, this Court vacated an opinion of the U.S. Court of Appeals for the Ninth Circuit, in part because of a related challenge to Article XXVIII in the Arizona Supreme Court. That state case has now concluded with a decision, based on the vacated federal opinion, striking down Article XXVIII as violating the First and Fourteenth Amendments to the Constitution of the United States.

Whether a State may require government employees to use its official language in governmental actions without offending their rights under the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

Rule 14.1 Listing

All parties in the proceeding below are listed in the caption.

Rule 29.1 Statement

Arizonans for Official English is an unincorporated association and has no parents or subsidiaries.

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Petitioners, Arizonans for Official English and Robert D. Park, pray that a writ of certiorari be granted to review the judgment of the Supreme Court of the State of Arizona, *en banc*, in *Ruiz v. Hull*, entered on April 28, 1998.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Arizona in *Ruiz v. Hull* is printed in the Appendix hereto ("App."), 1a, *infra*, and is to be reported at __ P.2d ___ (Ariz. 1998). The opinion of the Arizona Court of Appeals, Division One, is printed in the Appendix hereto, App. 49a, and is reported at 1996 WL 309512, 218 Ariz. Adv. Rep. 9 (App. 1996). The unreported opinion of the Superior Court of Maricopa County, No. CV 92-19603 (Cates, J.) is printed in the Appendix hereto, App. 59a.

This Court's earlier decision in *Arizonans for Official English v. Arizona*, No. 95-974, 517 U.S. __, 117 S.Ct. 1055 (1997), vacated and remanded a decision of the Ninth Circuit, reported at *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), *vacated on remand*, 118 F.3d 667 (9th Cir. 1997). The Arizona Court of Appeals, in the interests of comity, adopted the Ninth Circuit opinion in *Yniguez*. App. 58a. The Arizona Supreme Court also accepted the reasoning of the vacated Ninth Circuit opinion. App. 7a, n.1.

JURISDICTION

The judgment of the Supreme Court of the State of Arizona, declaring Article XXVIII of the Arizona Constitution unconstitutional under the First and Fourteenth Amendments to the United States Constitution, was entered on April 28, 1998. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article XXVIII of the Arizona Constitution:

ARTICLE XXVIII. ENGLISH AS THE OFFICIAL LANGUAGE

1. English as the official language; applicability

Section 1. (1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3) (a) This Article applies to: (i) the legislative, executive and judicial branches of government; (ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities; (iii) all statutes, ordinances, rules, orders, programs and policies; (iv) all government officials and employees during the performance of government business.

(b) As used in this Article, the phrase, "This State and all political subdivisions of this State" shall include every entity, person, action or item described in this Section, as appropriate to the circumstances.

2. Requiring this state to preserve, protect and enhance English

Section 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona.

3. Prohibiting this state from using or requiring the use of languages other than English; exceptions

Section 3. (1) Except as provided in Subsection (2):

(a) This State and all political subdivisions of this State shall act in English and in no other language.

(b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances: (a) to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.

(b) to comply with other federal laws.

(c) to teach a student a foreign language as part of a required or voluntary educational curriculum.

(d) to protect public health or safety.

(e) to protect the rights of criminal defendants or victims of crime.

4. Enforcement; standing

Section 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

U.S. Constitution, Amendment I (in part):

Congress shall make no law . . . abridging the freedom of speech . . .; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment XIV, Section I (in part):

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a "government speech" case (though the decision below does not mention government's own speech rights), asking whether a State may require that its own speech be in its official language. This case thus asks whether a State's right to "regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message," *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 833 (1995), is limited by the speech rights of government employees under *United States v. National Treasury Employees Union* ("*NTEU*"), 513 U.S. 454 (1995) and other cases.

Much of the background of this case can be found in earlier proceedings on this matter. *Arizonans for Official English v. Arizona*, 517 U.S. __, 117 S.Ct. 1055, 1060-67 (1997), *vacating*, *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995)(en banc).

Article XXVIII of the Arizona Constitution:

Article XXVIII of the Arizona Constitution ("Art. XXVIII") provides that English is the official language of Arizona and that most government actions shall be taken in English. Art. XXVIII, §§ 1(1), 3(1)(a). Art. XXVIII applies, *inter alia*, to "the legislative, executive and judicial branches of government," *id.*, § 1(3)(a)(i), and "all government officials and employees during the performance of government business." *Id.*, § 1(3)(a)(iv).

Under Art. XXVIII, the State "shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona." *Id.*, § 2. The State shall "act in English and in no other language", *id.*, § 3(1)(a), and may not require the use of a language other than English." *Id.*, § 3(1)(b). No governmental document is

effective unless it is in English. *Id.*, § 3(1)(c). There are exceptions to teach English and foreign languages, to comply with federal law, to protect public health or safety, and to protect the rights of criminal defendants or victims of crime. *Id.*, § 3(2).

A person who resides in or does business in Arizona has standing to bring suit[1] to enforce Art. XXVIII. *Id.*, § 4.

Art. XXVIII was adopted by initiative in 1988. Petitioner Arizonans for Official English ("AOE")[2] was the official proponent of the initiative and many of the plaintiffs below were opponents of the initiative.

Then-Arizona Attorney General Robert Corbin, after consultation with AOE, issued an opinion construing Art. XXVIII as applying only to "official acts of government." Ariz. Att'y Gen. Op. I89-009 (1989), at 5-6. *See, e.g., Kerby v. State ex rel. Frohmiller*, 62 Ariz. 294, 310-11, 157 P.2d 698, 705-06 (Ariz. 1945)("official acts" are "acts by an officer in his official capacity under color and by virtue of his office."). The Attorney General's opinion found that Art. XXVIII was constitutional as so interpreted.

How the Federal Questions Were Raised:

In 1992, several elected officials and government employees challenged Art. XXVIII as violating their own free speech rights and those of claimants for government services.

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[1]Besides this case and *Yniguez*, only one other suit has involved Art. XXVIII; in *Robles v. Mofford*, No. 261837 (Sup. Ct. Pima County), Nov. 14, 1989, Judge Hannah dismissed a First and Fourteenth Amendment challenge to Art. XXVIII filed by a litigant who wanted to file legal papers in Spanish. Both AOE and the State were involved in *Robles*.

[2]"AOE" as used throughout also includes Park.

The action was brought under 42 U.S.C. § 1983 and the Arizona Declaratory Judgment Act, A.R.S. § 12-1831. First Amended Complaint, ¶ 1. The plaintiffs alleged that Art. XXVIII violated their rights under the First, Ninth and Fourteenth Amendments to the Constitution of the United States. *Id.*; App. 59a.

The Superior Court of Maricopa County, on cross-motions for summary judgment, found that Art. XXVIII:

did not violate the First Amendment because it was "content neutral" and did not reach constitutionally protected conduct, App. 60a;

did not violate the Ninth Amendment because "the right to communicate in the language of choice does not fall within the rights protected by the Ninth Amendment", App. 61a; and

did not violate the Equal Protection Clause of the Fourteenth Amendment because there was nothing in the record to show a discriminatory intent or purpose. App. 61a.

The Arizona Court of Appeals, Division One, reversed in part and affirmed in part. App. 51a. The Arizona Court of Appeals, in the interests of comity, adopted the opinion of the U.S. Court of Appeals for the Ninth Circuit in *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), *vacated*, 517 U.S. __, 117 S.Ct. 1055 (1997), *vacated on remand*, 118 F.3d 667 (9th Cir. 1997). App. 58a. In the vacated *Yniguez* opinion, the Ninth Circuit found that Art. XXVIII violated the First Amendment speech rights of government employees who wished to use a language other than English in their official duties. The Arizona Court of Appeals did not reach the Ninth or Fourteenth Amendment issues.

The Supreme Court of Arizona, also following the

reasoning of the Ninth Circuit's recently-vacated *Yniguez* decision, held that Art. XXVIII violated the First and Fourteenth Amendments to the U.S. Constitution. App. 6a-7a, ¶ 2. No Ninth Amendment issue was presented at this level. App. 12a, n. 4.

The Federal Challenge to Art. XXVIII:

The complex history of the federal challenge to Art. XXVIII is recounted in this Court's earlier decision. *Arizonans for Official English v. Arizona*, 517 U.S. __-__, 117 S.Ct. at 1060 - 67. To summarize: two days after the initiative passed, a state worker, Maria-Kelly Yniguez, sued for the right to execute her government documents in a language other than English. Yniguez evaluated medical malpractice claims against state hospitals, and had the authority to issue settlements of up to $10,000; her supervisor and auditors could not read or speak Spanish.

The U.S. District Court for the District of Arizona struck down Art. XXVIII, finding that it was facially overbroad, that the violation of the First Amendment was substantial, and that there were no conceivable limiting interpretations of Art. XXVIII which would uphold its constitutionality. *Yniguez v. Mofford*, 730 F. Supp. 309, 313-14, 317 (D. Ariz. 1990).

After interim decisions on intervention and mootness, 939 F.2d 727 (9th Cir. 1991), 975 F.2d 646 (9th Cir. 1992), the Ninth Circuit, *en banc*, agreed by a 6-5 vote that Art. XXVIII was unconstitutional. 69 F.3d 920 (9th Cir. 1995). The majority opinion was by Judge Reinhardt, concurrence by Judge Brunetti, and dissents by Judges Fernandez, Kozinski and Wallace.

Judge Reinhardt's majority opinion found that Art. XXVIII supported no state interests and interfered with the ability of the non-English-speaking populace of Arizona to

"receive information and ideas," 69 F.3d at 941, which are "unquestionably of public import" because they "pertain[] to the provision of governmental services and information." 69 F.3d at 940. The majority opinion dealt with the dissents' government speech analyses in a footnote, calling them "simply irrelevant here" because the majority thought government speech rights dealt only with "power to regulate government-subsidized speech of private parties." 69 F.3d at 940, n. 24.

Judge Fernandez wrote the principal dissent, concluding that Art. XXVIII did not violate the First Amendment. Citing *Rosenberger*, Judge Fernandez wrote: "the State has the right to control what it is paying for; it can control what is said by those acting on its behalf." 69 F.3d at 957. Judge Fernandez also found no protection for choice of language either as a mode of expression or for its content. 69 F.3d at 956-58. "The language does not, in the sense used here, change the content at all." 69 F.3d at 956. Judge Fernandez would have reaffirmed *Guadalupe Org. Inc., v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022, 1027 (9th Cir. 1978), which said that governmental choice of language was a political decision.

Judge Kozinski also dissented separately, finding that the majority would create a new right for government employees to "force their employer into federal court and make it prove, to the exacting standard of the First Amendment, that its interest in enforcing its laws outweighs their right not to make statements they find objectionable." 69 F.3d at 960.

This Court unanimously vacated the Ninth Circuit opinion, finding that there was no case or controversy because Yniguez had left government employment before the appeal matured. 517 U.S. __, __; 117 S.Ct. 1055, 1069 (1997). This Court's opinion referenced the case at hand, noting that after the Arizona Supreme Court had completed its review, the

federal constitutional issues might be greatly simplified. 517 U.S. at ___; 117 S.Ct. at 1075.

The State Court Challenge to Art. XXVIII:

Superior Court for Maricopa County:

Following the Ninth Circuit's mootness decision in *Yniguez*,[3] the plaintiffs brought this action in the Superior Court for Maricopa County. App. 11a, ¶ 11. Plaintiffs included several elected officials and government employees, all of whom claimed to communicate in Spanish during the performance of government business. *Id.* The plaintiffs sought a declaratory judgment that Art. XXVIII violates the First, Ninth, and Fourteenth Amendments to the U.S. Constitution. *Id.*

AOE intervened without opposition as defendants and, in the words of the Arizona Court of Appeals, became the "primary defending litigant." App. 55a (Ct. App.).

Judge Cates considered the case under cross-motions for summary judgment. App. 11a, ¶ 12, App. 61a. The parties filed statements of facts, most of which were admitted. *See,* Plaintiffs' Statement of Facts in Opposition to Intervening Defendants' Statement of Facts and In Support of Plaintiffs' Cross-Motion for Summary Judgment, ¶ 2. Admitted facts included Nos. 10 ("No plaintiff has knowledge of any person

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[3]Plaintiffs' counsel had been counsel to Ms. Yniguez in her federal action, and many plaintiffs were members of Arizonans Against Constitutional Tampering, which intervened on appeal in *Yniguez*. Counsel filed this case in 1992 "in the event the federal action [*Yniguez*] is overthrown on the grounds of mootness." "Clarification," *Maricopa Lawyer*, April 1995, P. 4, col. 1. Plaintiffs' counsel incorporated their *Arizonans for Official English* brief in this Court as their "Brief in Chief" in the proceeding below. Respondents' Supplemental Memorandum in Support of the Judgement of the Court of Appeals, P. 2, n. 1.

being sued for violation of [Art. XXVIII]."), 11 ("Plaintiffs did not change any personal action or conduct because of [Art. XXVIII]."), and 13 ("Most plaintiffs approved of English as the language of Government."). *Id.* None of the plaintiffs have had Art. XXVIII enforced against them. App., 45a, ¶ 74 (Martone, J., specially concurring).

After briefing and oral argument, Judge Cates ruled that Art. XXVIII was constitutional, finding it did not violate the First Amendment because it was content neutral and did not reach constitutionally-protected speech, App. 60a; it did not violate the Ninth Amendment because choice of language during the performance of governmental duties is not protected by that Amendment, App. 61a; and did not violate the Equal Protection Clause of the Fourteenth Amendment because the record contained no evidence of a discriminatory intent or purpose. App. 61a.

Arizona Court of Appeals, Division One:

On appeal, the Arizona Court of Appeals, Division One, reversed Judge Cates's constitutional holding. App. 51a. The Arizona Court of Appeals did not analyze the constitutionality of Art. XXVIII. Instead the court cited the principle of judicial comity and held that "it is appropriate for us to exercise our discretion and defer to the federal litigation [*Yniguez*] and thereby accept the construction of [Art. XXVIII] and the analysis that was set forth by the Ninth Circuit." App. 58a.

The Arizona Court of Appeals explained its deferral:

> Such deference promotes uniformity in interpretation of the law and discourages the parties from forum shopping. Further, the United States Supreme Court may choose to address the constitutionality of Article 28 and put both *Yniquez*

and the instant case to rest.
App. 58a.

Supreme Court of Arizona:

The Arizona Supreme Court stayed all proceedings while this Court was considering the *Yniguez* decision in *Arizonans for Official English v. Arizona*, No. 95-974. App. 12a, ¶ 13. After this Court vacated and remanded the Ninth Circuit opinion, 517 U.S. at __, 117 S.Ct. at 1075, the Arizona Supreme Court received further briefing and argument. App. 13a, ¶ 15.

AOE and the State argued that Art. XXVIII was constitutional as "government speech," State Defendants' Supplemental Brief ("State Supp. Br."), 11-13; Intervener-Defendants' Brief on Petition for Review ("AOE's Br."), 5-6, that the First Amendment did not protect choice of language by government employees on the job, State Supp. Br. 13; AOE Br. 6-7, that government's interest in requiring use of its official language is compelling, AOE Br. 7-8, and that any unconstitutionality in Art. XXVIII was curable by accepting the Arizona Attorney General's interpretation of Art. XXVIII as applying only to official government speech. AOE Br. 9-11. The plaintiffs argued that Art. XXVIII is a content-based prohibition against all elected officials and government employees using any language other than English in the performance of government business. App. 14a, ¶ 19.

At oral argument, the plaintiffs said that they would agree that Art. XXVIII was constitutional if it applied only to official government business; AOE and the State said that Art. XXVIII would be unconstitutional if it applied to more than government speech, such as private conversations. App.

45a, ¶ 75 (Martone, J, specially concurring).[4]

On April 28, 1998, the Arizona Supreme Court held that Art. XXVIII violated the First and Fourteenth Amendments to the U.S. Constitution. App. 6a-7a, ¶ 2.

> We hold that the Amendment violates the First Amendment to the United States Constitution because it adversely impacts the constitutional rights of non-English-speaking persons with regard to their obtaining access to their government and limits the political speech of elected officials and public employees. We also hold that the Amendment violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it unduly burdens core First Amendment rights of a specific class without materially advancing a legitimate state interest.

Id.

The Arizona Supreme Court first noted: "the importance of establishing common bonds and a common language between citizens is clear." App. 14a-15a, ¶ 20, *citing, inter alia, Guadalupe Organization*, 587 F.2d at 1027 (no constitutional mandate for multilingual education or curriculum). The court noted that the Arizona Enabling Act and Constitution require that schools be conducted in English and that state officers and legislators be able to speak, read,

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[4]Justice Martone claimed that the "plaintiffs argu[ed] that [Art. XXVIII] is unconstitutional because of its breadth, but no one argu[ed] that it is constitutional notwithstanding its breadth." App. 45a, ¶ 75. Both AOE and the State did so at oral argument and in their briefs. *See, e.g.*, State Supp. Br., 3, 11-13; AOE's Br. 5-15. This misunderstanding by Justice Martone may stem from a failure to consider the "government speech" analysis which underlies much of AOE's position. *See, infra.*

write and understand English well enough to conduct office duties without an interpreter. App. 14a-15a, ¶ 20. Federal law requires English skills for naturalization and immigration benefits. *Id.* Arizona law requires that pupils should be taught English well enough to attend classes held in English. App. 15a, ¶ 20.

The court also did "not imply that the intent of those urging passage of the Amendment or of those who voted for it stemmed from linguistic chauvinism or from any other repressive or discriminatory intent."[5] App. 16a, ¶ 23.

The court, however, stated that "the American tradition of tolerance 'recognizes a critical difference between encouraging the use of English and repressing the use of other languages.'" App. 16a, ¶ 22, *citing Yniguez*, 69 F.3d at 923. The court found that Art. XXVIII could violate the First Amendment rights of "many thousands of persons who would be precluded from receiving essential information from government employees and elected officials in Arizona's government." *Id.*

The court below rejected the Attorney General's narrowing construction, finding that it did not comport with the plain wording or the intent of the Amendment, and that the opinion suffered from both ambiguity and implausibility. App. 19a, ¶ 29.

The court then contrasted Art. XXVIII with official English declarations of other States, finding "Arizona's is

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[5] ***But see,*** **Supreme Court of Arizona, Council on Judicial Administration, "Resolution in Opposition to An 'English Only' Initiative," Resolution No. 87-1, November 3, 1987 ("WHEREAS a constitutional initiative sponsored by Arizonans for Official English is now being circulated. . . [T]he Council on Judicial Administration hereby opposes the 'English Only' initiative").**

unique" and divining little guidance from other courts. App. 24a-25a, ¶ 39. For example, the court said that California's official English law, Cal. Const. Art. III, § 6, "is specific and lengthy, [but] it does not prohibit the use of languages other than English."[6] App. 27a, ¶ 43.

The court noted that if Art. XXVIII "were merely symbolic or contained some of the express exceptions of the official English provisions discussed above, it might well have passed constitutional muster." *Id.* The court felt, however, that Art. XXVIII "is too broad," reaching teachers' conversations with parents, town hall discussions with constituents, and claimants seeking unemployment or workers' compensation benefits. App. 29a, ¶ 45.

The court held that Art. XXVIII inhibits free speech in two ways: by depriving limited and non-English-speaking persons of access to information about the government, App. 31a, ¶ 49, and by depriving government employees and officials of the ability to communicate with their constituents and the public. App. 32a, ¶ 51. The first deprivation, the court said, violates the claimants' "constitutional right to participate in and have access to government, a right which is one of the fundamental principle[s] of representative government in this country." App. 31a-32a, ¶ 50. The second

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[6]The court's belief does not comport with that of the California Attorney General's office, which opined on May 18, 1987, that California's constitutional amendment requires that an official document must be in English to be effective. *See, e.g.*, April 9, 1987 Letter from Floyd Shimomura, Deputy Atty. Gen'l, to Richard Martland, Chief Asst. Atty. Gen'l, discussed in Califa, "Declaring English the Official Language: Prejudice Spoken Here," 24 HARV. C.R.-C.L. L. REV.293, 348 n. 67 (1989); *Sandoval v. Hagan*, __ F. Supp. __, 1998 WL 295891 (M.D. Alabama, 1998), slip op. 145, n. 78 (same letter introduced as Plaintiffs' Exhibit 16).

deprivation bars "[m]eaningful communication" with "thousands of limited-English-proficient and non-English-speaking persons in Arizona" in violation of the rights of the government officials and employees. App. 32a, ¶ 51.

The court found that Art. XXVIII cannot be characterized as a content- and viewpoint-neutral ban, and that it had a chilling effect reinforced by the possibility of citizen suits against violators. App. 36a-37a, ¶¶ 58, 59. Ultimately, the court concluded that Art. XXVIII "violates the First Amendment." App. 37a, ¶ 59.

The court's opinion did not mention "government speech" or any case describing the rights of government to "regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message", *Rosenberger*, 515 U.S. at 833, despite the fact that the doctrine was briefed and argued to the court. State's Supp. Br. 11-13; AOE Br. 5-6.

The Arizona Supreme Court then examined whether Art. XXVIII violated the Equal Protection Clause of the Fourteenth Amendment. App. 38a, ¶ 60. The court's analysis was based on its finding that Art. XXVIII violated the First Amendment. *Id.* The court said Art. XXVIII must pass strict scrutiny review "because it impinges upon the fundamental First Amendment right to petition the government for redress of grievances." App. 38a, ¶ 61.

Because the court found that Art. XXVIII "curtails First Amendment rights," App. 39a, ¶ 62, it rejected the trial court's finding of no violation of the Equal Protection Clause and placed the burden of establishing constitutionality on AOE. *Id.* The court did not address whether a language minority constitutes a suspect class for equal protection purposes. *Id.*, n. 12.

The court found that Art. XXVIII was not narrowly

specific enough to survive strict scrutiny. App. 41a, ¶ 65. "The Amendment's goal to promote English as a common language does not require a general prohibition on non-English usage. English can be promoted without prohibiting the use of other languages. . ." App. 41a, ¶ 65.

The court also said that "[b]y permanently implementing a linguistic barrier between persons and the government they have a right to petition, the Amendment substantially burdens First Amendment rights". App. 42a, ¶ 66.

The court below said that it was not considering the limits of "officially *promoting* English as distinguished from banning non-English speech." App. 44a, ¶ 71. The court vacated the court of appeals' opinion, reversed the trial court's judgment and remanded the matter with instructions to enter judgment. App. 44a, ¶ 73.

REASONS FOR GRANTING THE WRIT

This is a facial challenge to Art. XXVIII; the court below expressly declined to treat this case as an overbreadth claim. App. 37a, n. 11. The original decision of the trial court was made on summary judgment; the provision was never enforced against those who brought this case. Facial invalidation "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973); *see also*, *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223 (1990)(noting that "facial challenges to legislation are generally disfavored"). This is a "heavy burden," *Rust v. Sullivan*, 500 U.S. 173, 183 (1991), and the decision below failed to meet that standard.

Judge Fernandez, in dissent in the Ninth Circuit's decision in *Yniguez,* summarized *Yniguez* in terms which are equally apt here:

> This case, then, presents a confluence of lines of argument. Employees of the State are subject to numerous restrictions upon their freedoms, their actions, and their speech, which the government could not impose upon the general public. The State can, in general, control the content and mode of its own speech, and the general public does not have a constitutional right to have the State provide services in any particular language. In the face of all of that, it is well neigh unintelligible to say that individual officers and employees of the State can perform state business in a language of their own choice, despite the State's direction that they shall use a particular language.

Yniguez, 69 F.3d at 958 (Fernandez, J., dissenting).

Federal courts are increasingly faced with decisions affected by governmental choice of language, including both claims for non-English-language services and challenges to governmental language choices. *See, e.g., Sandoval v. Hagan*, _ F.Supp. __ (M.D. Ala. 1998)(striking down English language drivers license examination as discriminatory); *Valeria G. v. Wilson*, __ F.Supp. ___ (N.D. Cal., July 15, 1998, No. C 98-2252 CAL)(rejecting constitutional challenge to implementation of initiative requiring English language instruction); *Carbajal v. Albuquerque Public School Dist*, Civ. 98-0279-MV/DIS (D. N.M.)(language minority children challenging public school system's failure to teach them English). These and other courts need guidance, and the decision below could mislead courts reviewing similar cases.

The decision below conflicts with settled decisions of this and other federal courts, ignores the proper role of the First Amendment, and injects erroneous constitutional theories into

current national political controversies. The decision below can be seen as inappropriately breathing new life into the vacated Ninth Circuit decision in *Yniguez*. The decision below will cause a new round of language-related constitutional challenges to governmental decisions. The decision below should be reviewed.

I. A STATE'S OFFICIAL LANGUAGE DOES NOT OFFEND THE FIRST AMENDMENT:

A. The Decision Below Conflicts With This Court's Decisions Involving "Government Speech."

One threshold step in any First Amendment speech case is to identify the speaker. Here the government itself is the speaker, Art. XXVIII, § 1(3), yet there is no mention in the decision below of government's rights to control its own speech. By ignoring government's own rights, the decision below distorts the analysis of government's power in a manner which will both mislead other courts and interfere with on-going public controversies.

This Court's unconstitutional conditions precedents lie on a "speech spectrum" ranging from private persons to government employees. *Board of County Commissioners, Wabaunsee County v. Umbehr*, 518 U.S. 668, 674-75 (1996).[7] Government's interest in speech depends on the speaker's proximity to government; the closer to government,

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[7]This speech spectrum ranges from "government employees, whose close relationship with the government requires a balancing of important free speech and government interests, to . . . users of public facilities . . . and recipients of small government subsidies, who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing." 518 U.S. at 674-75 (citations omitted).

the greater government's interest. *Id.*; *Rosenberger*, 515 U.S. at 833; *Rust*, 500 U.S. at 192-96.

Government's own speech is the closest to government, so government's control over its own speech is at a maximum. *Rosenberger*, 515 U.S. at 893, n. 11 (Souter, J., dissenting)("authority to make content-related choices is at its most powerful when the State undertakes" to advance its own speech).

The State can choose its own message when it is the speaker. "The purpose of the First Amendment is to protect private expression and nothing in the guarantee precludes the government from controlling its own expression or that of its agents." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139 n.7 (1973)(Stewart, J., concurring). More recently, this Court said "when the State is the speaker, it may make content-based choices." *Rosenberger*, 515 U.S. at 833; *see also National Endowment for the Arts v. Finley*, __ U.S. __, ___, No. 97-371, June 25, 1998 (recognizing government as "speaker," "buyer" and "patron").

Government may restrict its employees' expression to avoid the appearance of its endorsement or imprimatur. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988)(school district may insure that it is not associated with speaker's views or with any position on matters of political controversy). *See also id.* at 288-89 (Brennan, J., dissenting, but agreeing that the risk of erroneous attribution of views to the school might justify some restrictions on expression).

Similarly, "we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Rosenberger*, 515 U.S. at 833. And when the

government disburses public funds to private entities to convey a governmental message, the government "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantees." *Rosenberger*, 515 U.S. at 833.

This is a "government speech" case. By its terms, Art. XXVIII applies only to "the legislative, executive and judicial branches of government," Art. XXVIII, Section 1(3)(a)(i), and "all government officials and employees **during the performance of government business.**" *Id.*, Section 1(3)(a)(iv) (emphasis added). The standard of review when government is the speaker is whether the government's choice is "so irrational that it may be branded 'arbitrary'." *Kelley v. Johnson*, 425 U.S. 238, 248 (1976).

Numerous courts have found that language requirements are rational. For example, the Second Circuit, in *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983), found no constitutional objection to government notices in English:

> We need only glance at the role of English in our national affairs to conclude that the Secretary's actions are not irrational. Congress conducts its affairs in English, the executive and judicial branches of government do likewise. In addition those who wish to become naturalized United States citizens must learn to read English. 8 U.S.C. § 1423 (Supp. 1978) . . . Given these factors, it is not irrational for the Secretary to choose English as the one language in which to conduct her official affairs.

717 F.2d at 42-43. *See also*, *Toure v. United States*, 24 F.3d 444, 446 (2d Cir. 1994)(per curiam)(no right to government notices in French – applying the "broadly stated and thoroughly sensible ruling in *Soberal-Perez*"); *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973)(California's

choice to use English has reasonable basis); *Guadalupe Org.*, 587 F.2d at 1027 (no constitutional right to multilingual education); *Vialez v. New York City Housing Auth.*, 783 F.Supp. 109, 124 (S.D.N.Y. 1991)("Nothing could be fairer than to apply the English language uniformly to all tenants of whatever national origin"); *Alfonso v. Board of Review*, 89 N.J. 41, 444 A.2d 1075, 1077, *appeal dismissed and cert. denied*, 459 U.S. 806 (1982)(decision on requiring translation best left to political branches).

Even *Meyer v. Nebraska*, 262 U.S. 390 (1923), relied on by both the Ninth Circuit in *Yniguez* and the court below, App. 39a-41a, ¶¶ 63-64, said, "[t]he power of the State to . . . make reasonable requirements for all schools, including a requirement that they shall give instructions in English, is not questioned." 262 U.S. at 402.

Not withstanding its importance in First Amendment analysis, the government speech doctrine cannot be found in the decision below. There is no mention of any right by government to choose its own message, to direct how the message is to be delivered, or to prevent garbling or distortion. The failure to recognize the government speech doctrine in a case involving only government speech conflicts with several of this Court's most recent First Amendment holdings (discussed above).

Under the decision below, government does not have control over its own speech. It cannot choose the content of its own actions and those of its employees. It cannot ensure that its message is not garbled or distorted. Those decisions lie in the hands of government employees and claimants for government services, who can unilaterally decide how government will communicate.

A court reviewing a challenge to government speech must consider government's own rights. The court below simply

ignored them.

The court below may have been misled by the vacated Ninth Circuit opinion it was following. In *Yniguez*, Judge Reinhardt acknowledged government's speech rights in a footnote, but thought they were limited to government's control of the speech of third parties. 69 F.3d at 940, n. 24. But that interpretation ignores the plain words of *Rosenberger* ("when it [the government] is the speaker"), 515 U.S. at 833, and suggests that government has less control over its own speech and the speech of its employees on the job than over the speech of private contractors. Such an interpretation would violate the speech spectrum recognized in *Umbehr*. 518 U.S. at 674-75.

This Court should review the decision below to protect the government speech doctrine and the legitimate rights of government to control its own speech.

B. The Decision Below Conflicts With This Court's Decisions Involving Government Employees' Speech:

This Court has long permitted government employers to regulate government employees' expression if the speech affects the employees' work. *Kelley v. Johnson*, 425 U.S. 238 (1976)(personal appearance of employees can be regulated); *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 557-65 (1973)(political activities can be regulated).

Leaving aside violations of the government speech doctrine, the decision below conflicts with other courts' decisions on government employees' speech and expands the rights of government employees to speak on the job. For example, the court below quotes *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) for the proposition that "employee commenting on matters of public

concern has right to speak, subject to consideration of governmental efficiency." App. 33a, ¶ 51. Yet *NTEU* was specifically limited in ways the lower court ignored or contradicted. Employees' rights to comment on matters of public concern are those of "citizens" and do not apply to speech "as government employees." 513 U.S. at 464. In addition, *NTEU* was careful to apply its First Amendment protections to employees' activities off the job. *Id.* In contrast, Art. XXVIII applies only to government employees' speech on the job.

This Court has never found a First Amendment right to comment "as government employees." If nothing else, this decision will generate what *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-66 (1979), and *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 285-86 (1983), would not: a "special constitutional right to a voice in the making of policy by their government employer." 465 U.S. at 285.

If left unreviewed, this "dangerous notion that government employees have a personal stake in the words they utter when they speak for the government", *Yniguez*, 69 F.3d at 962 (Kozinski, J., dissenting), could spawn numerous challenges to government policies such as the death penalty, affirmative action, or other controversial topics. In fact, the decision below might permit government employees to oppose the State's choice to provide services in languages other than English to the very persons the Arizona court purports to aid. *See e.g., Cota v. Tucson Police Dept.*, 783 F. Supp. 458 (D. Ariz. 1992)(detectives challenged policy that they use Spanish on the job).

The lower courts need guidance on this issue. The Ninth Circuit alone has considered language-related workplace disputes several times in the last decade. *See e.g., Jurado v.*

Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1987)(employer could require radio announcer to use English); *Gutierrez v. Municipal Court of the Southeast Judicial District*, 838 F.2d 1031, 1043 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989)(English-on-the-job rule for court clerks discriminatory; court should hire bilingual supervisors to discipline clerks who use Spanish to utter racial slurs); *id.*, 861 F.2d 1187, 1194 (9th Cir. 1988)(Kozinski, J., dissenting from denial of rehearing *en banc*)(hiring bilingual supervisors instead of African-Americans is a "let them eat cake" approach, which will exacerbate workplace tensions); *Garcia v. Spun-Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228; *id.*, 13 F.3d 296 (Reinhardt, J., dissenting from denial of rehearing *en banc*).

The circuits are split on how to handle public employees' First Amendment claims related closely to their official duties. The D.C. Circuit, voting 5-4 *en banc*, recently applied First Amendment protections to government employees' unapproved travel to speak on topics related to their official duties. *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995). The Sixth Circuit has said that conversations in the course of employment are not protected by the First Amendment. *Thomson v. Scheid*, 977 F.2d 1017, 1021 (6th Cir. 1992), *cert. denied*, 508 U.S. 910 (1993). The Tenth Circuit has said that there is no *per se* exemption from First Amendment protection for officials' speech. *Koch v. City of Hutchinson*, 847 F.2d 1436, 1442 (10th Cir.), *cert. denied*, 488 U.S. 909 (1988). None of these cases, however, involved speech on behalf of the government.

Under the decision below, the government could require an employee to cut his hair and salute the flag, *Kelley v. Johnson*, 425 U.S. at 245-46, but could not tell him what to say on the job. The decision below should be reviewed to-

provide national uniformity and to give guidance to the many courts which will be faced with language-related claims by public employees.

C. The Decision Below Contradicts This Court's Decisions on Public Forum Speech:

The decision below also ignores or contradicts this Court's First Amendment forum analysis. First Amendment protection for speech depends, in part, on whether the speech is made in a public forum. *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)(nonpublic forum is "public property which is not by tradition or designation a forum for public communication").

Government speech is the least public of all fora. There is no right to take over the government or force it to support a view other than that it wishes to espouse. *Rust*, 500 U.S. at 194 (when Congress chose to establish National Endowment for Democracy, it was not required to fund programs encouraging totalitarianism). Nor do government employees have, by right of their positions, constitutional rights to pontificate on policy issues. *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464-66 (1979); *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 285-86 (1983).

Yet the decision below treats the provision of government services and the interaction with government employees as public fora. Analogizing to the right to petition, App, 31a-32a, ¶ 50, the court below finds that there is a First Amendment right to force the government to listen to speech of any type or in any fashion the speaker wishes. This position would create public fora whenever a topic of discussion is of public concern. This finding contradicts settled decisions of this Court, and, as Judge Kozinski

predicted in dissent in *Yniguez*, will lead to numerous conflicts over this new right to use the courts to force government actions.

A State's choice to use an official language does not offend the First Amendment. The decision below would limit this choice to symbolic acts of encouragement. This limit, however, conflicts with established law, ignores basic rights, and creates troubling new entitlements. The decision should be reviewed.

II. A State's Official Language Does Not Offend Equal Protection:

A. The Decision Below Conflicts With This Court's Decisions On Facial Invalidity and Overbreadth:

The courts below found no evidence of discriminatory intent in the record of this summary judgment case. Nor was Art. XXVIII ever applied against these plaintiffs. Since legislation should not be invalidated on the basis of "its hypothetical application to situations not before the Court," *NEA*, __ U.S. at __, *quoting FCC v. Pacifica Foundation*, 438 U.S. 726, 743 (1978), the court below should not have found an Equal Protection violation. Thus, these plaintiffs should have had a difficult time proving facial invalidity, "since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Nevertheless, the court below found a violation of Equal Protection based primarily on its finding that Art. XXVIII violates the First Amendment. App. 39a, ¶ 62. Thus, the court below held that the burden shifted to AOE to establish the constitutionality of Art. XXVIII. *Id.*

This burden-shifting transforms facial invalidity analysis into overbreadth analysis. Since overbreadth analysis is

available only in First Amendment cases, the Arizona court's Equal Protection reasoning was fatally flawed and could confuse other courts. The decision below should be reviewed to reinforce traditional facial invalidity analysis.

B. The Decision Below Contradicts Other Courts' Holdings that Language Is Not A Suspect Characteristic:

Nor can Art. XXVIII be construed as national origin discrimination, since it deals only with language. A rule equating language with national origin has no basis in legislative history or fact.

Neither the Fourteenth Amendment nor federal laws define "national origin." This Court has noted that the legislative history concerning the meaning of national origin is "quite meager." *Espinoza v. Farah Mgf. Co.*, 414 U.S. 86, 88 (1973). The term on its face refers to the "country where a person was born, or, more broadly, the country from which his or her ancestors came." *Id.*; *see also, Pejic v. Hughes Helicopters*, 840 F.2d 667, 672-3 (9th Cir. 1988)(persons of Serbian national origin are members of protected class under Title VII).

Language does not easily fit into that history. The language a person speaks does not correspond to the usual characteristics of national origin or of a suspect classification under the Fourteenth Amendment. Language classifications do not indicate with requisite specificity the country a person or a person's ancestors came from; at least 13 countries, for example, have Spanish as their official or national language. A. Blaustein and D. Epstein, *Resolving Language Conflicts: A Study of the World's Constitutions* (1986). Nor is language an immutable characteristic.

This Court has never held that language can be equated to

national origin. Urged to take such a position in *Hernandez v. New York*, 500 U.S. 352 (1991), the Court did not.

Many other courts, however, have held that language cannot be equated with national origin and language minorities are not automatically suspect classes. *See, e.g., Soberal-Perez*, 717 F.2d at 41 ("Language, by itself, does not identify members of a suspect class."); *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir. 1975)(English language civil service examinations did not affect suspect class); *Carmona v. Sheffield*, 475 F.2d at 739 (California's choice to use English has reasonable basis); *Guadalupe Org.*, 587 F.2d at 1027 (language choice in school a political matter); *Vialez v. New York City Housing Auth.*, 783 F.Supp. at 124 ("Nothing could be fairer than to apply the English language uniformly to all tenants of whatever national origin").

Yet at least one federal court has used the decision in this case to strike down State English-language requirements. *Sandoval v. Hagan*, __ F.Supp. ___, 1998 WL 295891 (M.D. Ala. 1998)(equating language and national origin and striking English-language requirement for drivers license examinations because it disparately impacts persons from many different countries). Other courts may follow, encouraged to ignore the precision required to determine Equal Protection classifications appropriately. That would violate this Court's teaching: "The earnestness of this Court's commitment to racial justice is not to be measured by its willingness to expand constitutional provisions designed for other purposes beyond their proper bounds." *Holland v. Illinois*, 493 U.S. 474, 488 (1990).

A better approach would be to determine, on an "as-applied" basis, if a particular challenged activity violates existing proscriptions. That could not be done in this case, because the state of the record does not permit it. The court

below ignored these rules and simply reversed the burden of proof. The decision should be reviewed to protect against the distortion of existing prohibitions and the creation of unwarranted new suspect classes.

III. The Decision Below Injects Erroneous Constitutional Theories Into A Current National Political Debate:

The degree to which government can choose languages for internal operations is a topic of national debate. Twenty-two States have adopted English as their official languages.[8] On June 2, 1998, California voters overwhelmingly adopted an initiative designed to teach children in English instead of in their native tongues. California Secretary of State, *State Ballot Measures*, http://primary98.ss.ca.gov/Returns/prop. Congress is currently debating whether to end similar federal support for native language instruction. *See, e.g.*, H. Rep. 105-587. A major topic in the debate over a bill to permit

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[8]**Alabama**: Ala. Const. Amend. 509 (1990); **Arizona**: Ariz. Const. Art. XXVIII (1988); **Arkansas**: Ark. Stat. Ann. 1-4-117 (1987); **California**: Cal. Const. Art. III, § 6 (1986); **Colorado**: Colo. Const. Art. II, § 30 (1988); **Florida**: Fla. Const. Art. II, § 9 (1988); **Georgia**: Ga. Code Ann. § 50-3-30 (1986); **Hawaii**: Hawaii Const. Art. XV, § 4 (1978; Hawaiian is second official language); **Illinois**: Ill. Rev. Stat. Ch. 1, § 3005 (1969); **Indiana**: Ind. Code Ann. § 1-2-10-1 (1984); **Kentucky**: Ky. Rev. Stat. § 2.013 (1984); **Mississippi**: Miss. Code Ann. § 3-3-31 (1987); **Montana**: Mont. Code Ann. § 1-1-510 (1995); **Nebraska**: Neb. Const. Art. I, § 27 (1920); **New Hampshire**: 1995 N.H. Laws 157 (1995); **North Carolina**: N.C. Gen. Stat. Ch. 145, § 12 (1987); **North Dakota**: N.D. Cent. Code, § 54-02-13 (1987); **South Carolina**: S.C. Code Ann. § 1-1-(696-698) (1987); **South Dakota**: S.D. Codified Laws Ann. §§ 1-27-20 to 1-27-26 (1995); **Tennessee**: Tenn. Code Ann. § 4-1-404 (1984); **Virginia**: Va. Code § 22.1-212.1 (1950); **Wyoming**: Wyo. St. 8-6-101 (1996).

Puerto Rico to become a state is government language policies. CONG. REC. (daily ed.) March 4, 1998, H772 - H 837.

The decision below will distort these debates, turning a quintessentially political choice, *Guadalupe Org.*, 587 F.2d at 1027, into a constitutional mandate for multilingualism on demand.

The decision below improperly ignores and limits the government speech doctrine, conflicts with other courts' decisions, and injects its erroneous reasoning into important current political debates. The lower court opinion should be reversed.

CONCLUSION

For the reasons stated, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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July 23, 1998

APPENDIX

No._____

In The

Supreme Court of the United States

October Term 1997

Arizonans for Official English and Robert D. Park,
Petitioners

v.

State of Arizona; Jane Dee Hull, Governor of Arizona; Grant Woods, Attorney General of Arizona; Armando Ruiz; Linda Aguirre; John Philip Evans; Rosie Garcia; Candido Mercado; Manuel Peña, Jr.; Peter Rios, Jr.; Macario Saldate IV; Federico Sanchez; and Victor Soltero
Respondents

APPENDIX

to Petition for Writ of Certiorari to the Supreme Court of the State of Arizona

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July 23, 1998

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IN THE SUPREME COURT
OF THE STATE OF ARIZONA
En Banc

ARMANDO RUIZ, LINDA AGUIRRE, JOHN PHILIP EVANS, ROSIE GARCIA, CANDIDO MERCADO, MANUEL PENA, JR., PETER RIOS, JR., MACARIO SALDATE IV, FEDERICO SANCHEZ and VICTOR SOLTERO, Plaintiffs-Appellants-Cross-Appellees,	)
v.	)
JANE DEE HULL, GOVERNOR OF ARIZONA; GRANT WOODS, ATTORNEY GENERAL OF ARIZONA; STATE OF ARIZONA; ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARK, Intervenors, Defendants/ Appellees-Cross-Appellants.	)

Supreme Court
No. CV-96-0493-PR
Court of Appeals
No. 1-CA-CV 94-0235
Maricopa County
No. CV 92-19603

OPINION

Appeal from the Superior Court of Maricopa County
The Honorable Jeffrey S. Cates, Judge

REVERSED WITH DIRECTIONS

Opinion of the Court of Appeals, Division One,
____ Ariz. ____, ____ P.2d ____ (App. 1996)

VACATED

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M O E L L E R, JUSTICE

SUMMARY

¶1 This opinion addresses the constitutionality of Article XXVIII of the Arizona Constitution (the "Amendment"), which was adopted in 1988 and which provides, *inter alia*, that English is the official language of the State of Arizona and that the state and its political subdivisions - including all government officials and employees performing government business - must "act" only in English.

¶2 We hold that the Amendment violates the First Amendment to the United States Constitution because it

adversely impacts the constitutional rights of non-English-speaking persons with regard to their obtaining access to their government and limits the political speech of elected officials and public employees. We also hold that the Amendment violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it unduly burdens core First Amendment rights of a specific class without materially advancing a legitimate state interest.

¶3 In making these rulings, we express no opinion concerning the constitutional validity of less restrictive English-only provisions discussed in this opinion. We also emphasize that nothing in this opinion compels any Arizona governmental entity to provide any service in a language other than English.

FACTS AND PROCEDURAL BACKGROUND

I. The Amendment

¶4 In October 1987, Arizonans for Official English ("AOE") initiated a petition drive to amend Arizona's constitution to designate English as the state's official language and to require state and local governments in Arizona to conduct business only in English. As a result of the general election in November 1988, the Amendment was added to the Arizona Constitution, receiving affirmative votes from 50.5% of Arizona citizens casting ballots. *See Yniguez v. Arizonans for Official English* ("AOE"), 69 F.3d 920, 924 (9th Cir. 1955) (en banc).[1] The Amendment, entitled

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[1]As pointed out *infra*, the Ninth Circuit's opinion in *Yniguez v. AOE* was vacated by the United States Supreme Court because Yniguez lacked standing. *AOE v. Arizona*, 117 S.Ct. 1055 (1997), *vacated on remand, Yniguez v. AOE*, 118 F.3d 667 (9th Cir. 1997). On the merits of the case, however, we agree with the result and with much of the

"English as the Official Language," is set forth in full in the Appendix and provides that "[t]he State and all political subdivisions of [the] State shall act in English and in no other language." The Amendment binds all government officials and employees in Arizona during the performance of all government business, and provides that any "person who resides in or does business in this State shall have standing to bring suit to enforce this article in a court of record of the State."

II. Yniguez v. Mofford

¶5 Two days after the voters passed the Amendment, Maria-Kelly F. Yniguez sued the State of Arizona, the Governor, and various parties pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of Arizona, seeking to enjoin enforcement of the Amendment and to have it declared unconstitutional under the First and Fourteenth Amendments. She also contended that it violated federal civil rights laws. *Yniguez v. Mofford*, 730 F.Supp. 309 (D. Ariz. 1990). When she filed her action, Yniguez was employed by the Arizona Department of Administration and handled medical malpractice claims asserted against the state. Yniguez was bilingual, fluent and literate in both Spanish and English, and, prior to the Amendment's passage, she communicated in Spanish with monolingual Spanish-speaking claimants and in a combination of English and Spanish with bilingual claimants. *Id.* at 310.

¶6 By the time the district court ruled, only the Governor

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reasoning of the Ninth Circuit opinion. Thus, we refer to the Ninth Circuit opinion throughout this opinion, recognizing that it has been vacated on grounds unrelated to the merits of the issues with which we are presented.

remained as a defendant. *Id.* The district court granted declaratory relief, finding that the Amendment was facially overbroad in violation of the First Amendment. *Id.* at 313. Injunctive relief, however, was denied because there was no enforcement action pending against Yniguez. *Id.* at 317. The Governor did not appeal the decision. The Attorney General of Arizona, AOE, and Robert D. Park, a principal sponsor of the Amendment, then moved to intervene for purposes of pursuing an appeal. The district court denied the motion. *Yniguez v. Mofford*, 130 F.R.D. 410 (D. Ariz. 1990).

¶7 The Ninth Circuit Court of Appeals reversed the district court's denial and also allowed Arizonans Against Constitutional Tampering, the principal opponent of the Amendment, to intervene as plaintiffs-appellees. *Yniguez v. AOE*, 42 F.3d 1217, 1223-24 (9th Cir. 1994). The intervention of the Arizona Attorney General was permitted for the limited purpose of urging adoption of his narrow interpretation of the Amendment discussed below ir, alternatively, to urge the certification of the interpretation of the Amendment to this court pursuant to Arizona Revised Statutes Annotated ("A.R.S.") § 12-1861.[2]

¶8 The State of Arizona filed a suggestion of mootness because Yniguez was no longer employed by the State of Arizona. The court of appeals rejected the suggestion of

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[2]The Ninth Circuit affirmed the district court's denial of the Arizona Attorney General's Motion to Intervene insofar as he sought to be reinstated as a party in the appeal, but permitted the intervention for the limited purpose described. *See Yniguez v. Arizona*, 939 F.2d 727, 740 (9th Cir. 1991). The district court had refused to certify the question of the proper interpretation of the Amendment to this court, ruling that certification was inappropriate because the Amendment is not susceptible of a narrowing construction, and therefore could not be held constitutional. *See Yniguez v. Mofford*, 130 F.R.D. at 411.

mootness, reasoning that Yniguez had a right to appeal the district court's failure to award nominal damages to her and, therefore, had a sufficient concrete interest in the outcome of the litigation to confer standing to pursue declaratory relief. *Yniguez v. Arizona*, 975 F.2d 646, 647 (9th Cir. 1992) (citations omitted).

¶9 AOE appealed the district court's judgment that declared the Amendment unconstitutional and Yniguez cross-appealed the denial of nominal damages. A panel of the Ninth Circuit Court of Appeals agreed with the district court that the Amendment is unconstitutionally overbroad and also held that Yniguez was entitled to nominal damages. *Yniguez v. AOE*, 42 F.3d at 1229, 1243. The Ninth Circuit then reheard the case en banc and affirmed. *Yniguez v. AOE*, 69 F.3d at 947.

¶10 AOE petitioned for certiorari to the United States Supreme Court, which granted the petition and ordered additional briefing on whether the petitioners had standing to maintain the action and whether there remained a federal case or controversy with respect to Yniguez, in light of the fact that she was no longer employed by the State of Arizona. In a unanimous decision, the Supreme Court vacated the Ninth Circuit opinion and remanded to that court with directions that the action be dismissed. *AOE v. Arizona*, 117 S.Ct. 1055, 1075 (1997). The Court held there was no case or controversy to support federal court jurisdiction and determined that the lower court decisions should be vacated because the Ninth Circuit should have certified the construction of the Amendment to this court. *Id.* at 1074. In doing so, the Court expressed no opinion on the constitutionality of the Amendment. *Id.* at 1060.

III. This Litigation

¶11 In November 1992, the ten plaintiffs in this case brought an action in superior court against then-Governor J. Fife Symington, III and the Attorney General. On September 5, 1997, Governor Symington resigned and was succeeded by Jane Dee Hull, who has been substituted pursuant to Rule 27(c)(1) of the Arizona Rules of Civil Appellate Procedure. The plaintiffs sought a declaratory judgment that the Amendment violates the First, Ninth, and Fourteenth Amendments of the United States Constitution. The plaintiffs are four elected officials,[3] five state employees, and one public school teacher. They are all bilingual and regularly communicate in both Spanish and English as private citizens and during the performance of government business. Plaintiffs allege that they speak Spanish during the performance of their government jobs and that they "fear communicating in Spanish 'during the performance of government business' in violation of Article XXVIII of the Arizona Constitution."

¶12 The principal sponsors of the Amendment, AOE and Robert D. Park, AOE's spokesperson, intervened as defendants. On cross-motions for summary judgment, the superior court ruled that the Amendment is constitutional, finding that it (1) is a content-neutral regulation that does not violate the First Amendment; (2) does not violate the Equal Protection Clause of the Fourteenth Amendment because there is no proof of discriminatory intent; and (3) does not violate the Ninth Amendment because it does not

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[3]Arizona State Senator Joe Eddie Lopez was substituted for retired Senator Manuel Pena by this court's order of May 2, 1997.

protect choice of language.[4] The trial court denied AOE's request for attorneys' fees pursuant to A.R.S. § 12-2030, and AOE appealed that denial. Under this opinion, AOE is no longer a prevailing party so we do not discuss its request for attorneys' fees further.

¶13 On appeal, the court of appeals reversed in part and affirmed in part. *Ruiz v. AOE*, 1996 WL 309512, 218 Ariz. Adv. Rep. 9 (App. 1996). Citing the principle of judicial comity, the court held that "it is appropriate for us to exercise our discretion and defer to the federal litigation and thereby accept the construction of Article [XXVIII] and the analysis that was set forth by the Ninth Circuit." 1996 WL 309512 at *4, 218 Ariz. Adv. Rep. at 12. The state defendants petitioned this court for review, which we granted. In 1996, we stayed all proceedings pending the supreme Court's decision in *AOE v. Arizona*.

¶14 As already noted, in 1997 the United States Supreme Court held that Yniguez' federal court claim was moot and remanded with directions that it be dismissed. Plaintiffs then filed a motion in this court to lift the stay and requested leave to submit supplemental briefs and for oral argument. AOE filed a motion to vacate our order granting review. AOE maintained, in essence, that there was no court of appeals decision for this court to review because the court of appeals had adopted the Ninth Circuit's construction and analysis of the Amendment, *see Yniguez v. AOE*, 69 F.3d at 947, and the United States Supreme Court had vacated the Ninth Circuit's opinion was "eradicated." Thus, AOE requested us to either affirm the trial court's judgment or to return the matter to the court of appeals for consideration. We denied AOE's motion

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[4]No Ninth Amendment issue has been presented to us on appeal.

to vacate the order granting review and granted plaintiffs' motion to lift the stay.

¶15 This court then received supplemental briefing and heard oral argument from the parties. In addition, numerous amici curiae briefs were filed on behalf of a host of organizations and individuals. We reviewed, considered, and appreciate the many amici briefs which advanced varying positions in this case. However, in accordance with our practice, we base our opinion solely on legal issues advanced by the parties themselves. *See Town of Chino Valley v. City of Prescott* 131 Ariz. 78, 84, 638 P.2d 1324, 1330 (1981), *appeal dismissed*, 457 U.S. 1101, 102 S.Ct. 2897, *reh. denied*, 459 U.S. 899 (1982), citing *City of Tempe v. Prudential Ins. Co.*, 109 Ariz. 429, 510 P.2d 745 (1973) (holding that amici curiae are not permitted to create, extend, or enlarge issues beyond those raised and argued by the parties). Because we resolve the case on the merits as presented by the parties, we do not discuss the concerns referred to in the special concurrence because, as the special concurrence itself observes, the parties have not raised, briefed, or argued any matter referred to by the special concurrence.

¶16 We have jurisdiction pursuant to A.R.S. § 12-102.21.

ISSUES

¶17 1. Whether the trial court erred by ruling that the Amendment did not violate the First Amendment to the United States Constitution because it was content-neutral, did not reach constitutionally-protect free speech rights, and was thus not fatally overbroad.

¶18 2. Whether the trial court erred by concluding that the Amendment did not violate the Fourteenth Amendment to the United States Constitution because

there was no proof of discriminatory intent.

DISCUSSION

I. Introduction

¶19 Plaintiffs contend that the Amendment is a blanket prohibition against all publicly elected officials and government employees using any language other than English in the performance of any government business. Therefore, they reason that the Amendment is a content-based regulation of speech contrary to the First Amendment. Plaintiffs also argue that the Amendment constitutes discrimination against non-English-speaking minorities, thereby violating the Equal Protection Clause of the Fourteenth Amendment. AOE and the state defendants respond that the Amendment should be narrowly read and should be construed as requiring the use of English only with regard to "official, binding government act." They argue that this narrow construction renders the Amendment constitutional.

¶20 At the outset, we note that this case concerns the tension between the constitutional status of language rights and the state's power to restrict such rights. On the one hand, in our diverse society, the importance of establishing common bonds and a common language between citizens is clear. *Yniguez v. AOE*, 69 F.3d at 923, citing *Guadalupe Organization, Inc. v. Tempe Elementary Sch. Dist.*, 587 F.2d 1022, 1027 (9th Cir. 1978). We recognize that the acquisition of English language skills is important in our society. For instance, as a condition to Arizona's admission to the Union, Congress required Arizona to create a public school system and provided that "said schools shall always be conducted in English." Act of June 20, 1910, ch. 310, § 20(4). That same Act requires all state officers and members of the Legislature to have the "ability to read, write, speak

and understand the English language sufficiently well to conduct the duties of the office without the aid of an interpreter." *Id.*, § 20(5). Also, the Sixth Amendment permits an English language requirement for jurors. *United States v. Benmuhar*, 658 F.2d 13, 18-20 (1st Cir. 1981) (noting that state's significant interest in having branch of national court system operate in national language rebutted defendant's prima facie showing that English proficiency requirements for jurors resulted in under representation). Congress has recognized the importance of understanding English in such matters as naturalization legislation, 8 U.S.C. § 1423, and the need for the education of non-English-speaking students, Equal Educational Opportunity Act of 1974, 20 U.S.C. §§ 1701-1758. Indeed, Arizona law mandates that school districts in which there are pupils who have limited English proficiency[5] shall provide programs of bilingual instruction or English as a second language with a primary goal of allowing the pupils to become proficient in English in order to succeed in classes taught in English. A.R.S. § 15-752. Finally, the importance of acquiring English skills is emphasized in the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1255a(b)(1)(D), which legalizes resident status of illegal immigrants who demonstrate progress toward learning English, and terminates legal residence for those who make little or no progress, 8 U.S.C. § 1255a(b)(2)(C).

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[5]"Limited English proficient" is defined as having a "low level of skill in comprehending, speaking, reading or writing the English language because of being from an environment in which another language is spoken." A.R.S. § 15-751(1). Article 20, paragraph 7 of the Arizona Constitution provides that Arizona public schools shall be conducted in English.

¶21 Indeed, English is also the language of political activity through initiative petition. *See Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988) (providing that initiative petitions that are printed only in English are not covered by and do not offend provisions of the Voting Rights Act); *accord Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988).

¶22 However, the American tradition of tolerance "recognizes a critical difference between encouraging the use of English and repressing the use of other languages." *Yniguez v. AOE*, 69 F.3d at 923. We agree with the Ninth Circuit's statement that Arizona's rejection of that tradition by enacting the Amendment has severe consequences not only for Arizona's public officials and employees, but also for the many thousands of persons who would be precluded from receiving essential information from government employees and elected officials in Arizona's governments. *Id.* If the wide-ranging language of the prohibitions contained in the Amendment were to be implemented as written, the First Amendment rights of all those person would be violated, *id.*, a fact now conceded by the proponents of the Amendment, who, instead, urge a restrictive interpretation in accordance with the Attorney General's narrow construction discussed below.

¶23 By this opinion, we do not imply that the intent of those urging passage of the Amendment or of those who voted for its stemmed from linguistic chauvinism or from any other repressive or discriminatory intent.[6] Rather we assume,

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[6]We fully recognize that the power of the people to legislate is as great as that of the Legislature. *See* Ariz. Const. art. IV; *Salt River Pima-Maricopa Indian Community v. Hull*, 190 Ariz. 97, 103, 945 P.2d 818, 824 (1977); *Queen Creek Land & Cattle Corp. v. Yavapai County Board of Sup'rs*, 108 Ariz. 449, 451, 501 P.2d 391, 393 (1972).

without deciding, that the drafters of the initiative urged passage of the amendment to further social harmony in our state by having English as a common language among its citizens.

¶24 This court must interpret the Amendment as a whole and in harmony with other portions of the Arizona Constitution. *See ex rel. Nelson v. Jordan*, 104 Ariz. 193, 196, 450 P.2d 383, 386 (1969); *State ex rel. Jones v. Lockhart*, 76 Ariz. 390, 398, 265 P.2d 447, 452 (1953). And, if possible, we must construe the Amendment to avoid conflict with the United States Constitution. *AOE v. Arizona*, 117 S.Ct. at 1074.

¶25 Every duly enacted state and federal law is entitled to a presumption of constitutionality. *Town of Lockport v. Citizens for Community Action at Local Level, Inc.*, 430 U.S. 259, 272-73, 97 S.Ct. 1047, 1055-56 (1977); *Eastin v. Broomfield*, 116 Ariz. 576, 580, 570 P.2d 744, 748 (1977). The presumption applies equally to initiatives as well as statutes, and where alternative constructions are available, the court should choose the one that results in constitutionality. *Slayton v. Shumway*, 166 Ariz. 87, 92, 800 P.2d 590, 595

However, we note that the search for the people's intent in passing initiatives is far different from the attempt to discern legislative intent: there are no legislative hearing transcripts, committee reports or other legislative history. Before an initiative is passed, no committee meetings are held; no legislative analysts study the law; no floor debates occur; no separate representative bodies vote on the legislation; no reconciliation conferences are held; no amendments are drafted; no executive official wields a veto power and reviews the law under that authority; and it is far more difficult for the people to "reconvene" to amend or clarify a law if a court interprets it contrary to the voters' intent. *See* Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 Yale L.J. 107, 109 (1955).

(1990); *Hernandez v. Frohmiller*, 68 Ariz. 242, 249, 204 P.2d 854, 859 (1949). However, as discussed more fully below, where the regulation in question impinges on core constitutional rights, the standards of strict scrutiny apply and the burden of showing constitutionality is shifted to the proponent of the regulation. *See generally Rosen v. Port of Portland*, 641 F.2d 1243, 1246, 1249 (9th Cir. 1981) (laws restricting speech face a heavy presumption against their constitutional validity and proponents bear burden of establishing that they are "narrowly tailored" to further a "compelling" government interest); *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576, 111 S.Ct. 2456, 2465-66 (1991) (Scalia, J., concurring). Mindful of these principles, we turn now to an analysis of the constitutionality of the Amendment.

II. Attorney General's Opinion

¶26 On its face, the Amendment provides that, except for some enumerated narrow exceptions, English is the official language of the State of Arizona, of all political subdivisions, of the ballot, the public schools, and government functions and actions. The exceptions pertain to the teaching of English as a second language, matters required by federal law, any matter pertaining to the protection of public health or safety, or of the rights of criminal defendants or victims of crime. *See* Appendix. Before making a facial analysis of the Amendment, however, we must first determine the propriety of adopting the Attorney General's proposed narrowing construction.

¶27 In 1989, shortly after the Amendment was passed, Robert Corbin, then Attorney General, issued an opinion upholding the constitutionality of the Amendment, based upon a narrow construction of the Amendment. Ariz. Att'y

Gen. Op. I89-009 (1989); *see also* Ariz. Att'y Gen. Ops. I89-013 and -014 (1989).

¶28 Opinions of the Attorney General are advisory. *Green v. Osborne*, 157 Ariz. 363, 365, 758 P.2d 138, 140 (1988), and are not binding. *Marston's Inc. v. Roman Catholic Church*, 132 Ariz. 90, 94, 644 P.2d 244, 248 (1982) (in division). However, the reasoned opinion of a state attorney general should be accorded respectful consideration. *See AOE v. Arizona*, 117 S.Ct. at 1073 n.30, citing *Huggins v. Isenbarger*, 798 F.2d 203, 207-10 (7th Cir. 1986) (Easterbrook, J., concurring).

¶29 While we duly consider the Attorney General's proposed narrowing construction, we reject that construction for three substantive reasons, each of which we discuss in turn. First, the proffered narrowing construction does not comport with the plain wording of the amendment, and hence, with the plain meaning rule guiding our construction of statutes and provisions in the Arizona Constitution. Second, it does not comport with the stated intent of the drafters of the amendment. Third, it suffers from both ambiguity and implausibility. Therefore, the narrowing construction is rejected because the Amendment's clear terms are not "readily susceptible" to the constraints that the Attorney General attempts to place on them. *Yniguez v. AOE*, 69 F.3d at 929; *see also Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 395, 108 S.Ct. 636, 644 (1988) (refusing to accept as authority a non-binding attorney general opinion where narrowing construction advocated by attorney general was not in accordance with the plain meaning of the statute).

A. Plain Meaning Rule

¶30 The Attorney General maintains that although the

Amendment declares English to be Arizona's "official" language, its proscriptions against the use of non-English languages should be interpreted to apply only to "official acts of government." Ariz. Att'y Gen. Op. I89-009, at 5-6. The Attorney General defines "official act" as "a decision or determination of a sovereign, a legislative council, or a court of justice." *Id.* at 7. Although he does not further explain what acts would be official, the Attorney General concludes that the Amendment should not be read to prohibit public employees from using non-English languages while performing their public functions that could not be characterized as official. The Attorney General opines that the provision "does not mean that languages other than English cannot be used when reasonable to facilitate the day-to-day operation of government." *Id.* at 10.

¶31 Somewhat curiously, intervenors now agree with the Attorney General that the Amendment should be held to govern only binding, official acts of the state, which they also seek to construe narrowly as "formal rule-making or rate making . . . or any other policy matters." AOE and the state defendants also point to the definition of "official act" adopted by the court in *Kerby v. State ex rel. Frohmiller*, 62 Ariz. 294, 310-11, 157 P.2d 698, 705-06 (1945). The court there defined "official acts" as "acts by an officer in his official capacity under color and by virtue of his office." *Id.* However, assuming, without deciding, that the government could require official acts to be conducted in English only, nothing in the language of the Amendment remotely supports such a limiting construction.

¶32 To arrive at his interpretation, the Attorney General takes the word "act" from § 3(1)(a) of the Amendment, which provides that, with limited exceptions, the "state and all political subdivisions of this State shall act in English and

in no other language." (Emphasis added.) The Attorney General proposes that the work "act" from § 3(1)(a) should be ascribed to the word "official," found in the Amendment's proclamation that English is the official language of Arizona. Therefore, the Attorney General interprets the Amendment to apply only to the official acts of the state and limits the definition of the noun "act" to a "decision or determination of a sovereign, a legislative council, or a court of justice." Op. Atty. Gen. Az. No. I89-009, at 7 (*quoting Webster's International Dictionary* 20 (3d ed., unabridged, 1976) (third meaning of "act")). We agree with the Ninth Circuit in *Yniguez v. AOE* that the former Attorney General's opinion ignores the fact that "act," when used as a verb as in the Amendment, does not include among its meanings the limited definition he proposed. 69 F.3d at 929. Similarly, section 1(2) of the Amendment also describes English as the language of "all government functions and actions." The amendment does not limit the terms "functions" and "actions" to official acts as urged by the Attorney General, and the ordinary meanings of those terms do not impose such a limitation. *Id.* at 929 n.13. We agree with the district court that originally evaluated the challenges to the Amendment in *Yniguez*: "The Attorney General's restrictive interpretation of the Amendment is in effect a 'remarkable job of plastic surgery upon the face of the [Amendment].'" *Yniguez v. Mofford*, 730 F.Supp. at 316, citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153, 89 S.Ct. 935, 940 (1969).

¶33 We hold that by ignoring the express language of the Amendment, the Attorney General's proposed construction violates the plain meaning rule that requires the words of the Amendment to be given their natural, obvious, and ordinary meaning. *County of Apache v. Southwest Lumber Mills, Inc.*, 92 Ariz. 323, 327, 276 P.2d 854, 856 (1962). By its express

terms, the Amendment is not limited to official governmental acts or to the "formal, policy making, enacting and binding activities of government." Rather, it is plainly written in the broadest possible terms, declaring that the "English language is the language of . . . *all government functions and actions*" and prohibiting all "government officials and employees" at every level of state and local government from using non-English languages "*during the performance of government business*." Amendment, §§ 1(2), 1(3)(a)(iv) (emphasis added).

B. Legislative Intent

¶34 We also believe the Attorney General's proposed construction is at odds with the intent of the drafters of the Amendment. The drafters perceived and obviously intended that the application of the Amendment would be widespread. They therefore inserted some limited exceptions to it. Those exceptions permit the use of non-English languages to protect the rights of criminal defendants and victims, to protect the public health and safety, to teach a foreign language, and to comply with federal laws. Amendment, § 3.2. Regardless of the precise limits of these general exceptions, their existence demonstrates that the drafters of the Amendment understood that it would apply to far more than just official acts.

¶35 For example, one exception allows public school teachers to instruct in a non-English language when teaching foreign languages or when teaching students with limited English proficiency. Such instruction by teachers is obviously not a "formal, policy making, enacting or binding activity by the government," the narrow construction urged by the Attorney General. The exceptions would have been largely, if not entirely, unnecessary under the Attorney General's proposed construction of the Amendment. When construing

statutes, we must read the statute as a whole and give meaningful operation to each of its provisions. *Kaku v. Arizona Board of Regents*, 172 Ariz. 296, 297, 836 P.2d 1006, 1007 (App. 1992).

¶36 In construing an initiative, we may consider ballot materials and publicity pamphlets circulated in support of the initiative. *Bussanich v. Douglas*, 152 Ariz. 447, 450, 733 P.2d 644, 647 (App. 1986). The ballot materials and publicity pamphlets pertaining to the Amendment do not support the Attorney General's limiting construction. In AOE's argument for the Amendment, Chairman Robert D. Park stated that the Amendment was intended to "require the government to *function in English*, except in certain circumstances," and then listed those exceptions set forth in section 4 of the Amendment (emphasis added). Chairman Park's argument then went on to state that "*[o]fficially sanctioned multilingualism causes tension and division within a state*. Proposition 106 [enacting the Amendment] will *avoid that fate* in Arizona." (Emphasis added.) The Legislative Council's argument in support of the Amendment stated that the existence of a multilingual society would lead to "the fears and tensions of language rivalries and ethnic distrust." Arizona Publicity Pamphlet in Support of the Amendment, at 26. Therefore, the Amendment's legislative history supports a broad, comprehensive construction of the Amendment, not the narrow construction urged by the Attorney General.

C. Ambiguity

¶37 The Attorney General's interpretation would unnecessarily inject elements of vagueness into the Amendment. We feel confident that an average reader of the Amendment would never divine that he or she was free to use

a language other than English unless one was performing an official act defined as "a decision or determination of a sovereign, a legislative council, or a court of justice."[7]

¶38 Because we conclude that the narrow construction advocated by the Attorney General is untenable, we analyze the constitutionality of the Amendment based on the language of the Amendment itself.

III. English-Only Provisions in Other Jurisdictions

¶39 Although English-only provisions have recently become quite common, Arizona's is unique. Thus, we receive little guidance from other state courts. Twenty-one states[8] and forty municipalities[9] have official English statutes.

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[7]Although it is unnecessary for us to address the plaintiffs' separate argument that the Amendment, as written, is unconstitutionally vague (because we hold that the Amendment violates the First and Fourteenth Amendments), we do note that the Attorney General's proposed narrowing construction, if adopted, would undoubtedly add weight to the plaintiffs' vagueness argument. A statute is vague if it fails to give fair notice of what it prohibits. *State ex rel. Purcell v. Superior Court*, 111 Ariz. 582, 584, 535 P.2d 1299, 1301 (1975); *see also Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127 (1926) (Vagueness if concerned with clarity of law; a law is void on its face, and thereby violates due process, if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application.").

[8]Ala. Const. amend 509 (1990); Ariz. Const. art XXVIII (1988); Ark. Code Ann. § 1-4-117 (1987); Cal. Const. art. III, § 6 (1986); Colo. Const. art. II, § 30a (1988); Fla. Const. art. II § 9 (1988); Ga. Code Ann. § 50-3-100 (1996); Haw. Const. art. XV, § 4 (1978) (also naming Hawaiian as an official language); 5 Ill. Comp. Stat. Ann. 460/20 (West 1993); Ind. Code Ann. § 1-2-10-1 (1984); Ky. Rev. Stat. Ann. § 2.013 (1984); Miss. Code Ann. § 3-3-31 (1987); Mont. Code Ann. § 1-1-510 (1995); Neb. Const. art. 1, § 27 (1920); N.H. Rev. Stat.

However, most of those provisions are substantially less encompassing and certainly less proscriptive than the Amendment. The official English provisions in most states appear to be primarily symbolic. *See, e.g., Puerto Rican Org. for Political Action v. Kusper*, 490 F.2d 575, 577 (7th Cir. 1973) (noting that official English law appears with laws naming the state bird and state song, and does not restrict the use to non-English languages by state and city agencies). Indeed, the Amendment has been identified as "by far the most restrictively worded official-English law to date." M. Arrington, Note, *English Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights*, 7 L.J. & Pol. 325, 327 (1991). This observation is shared by other commentators - who note that the Amendment "is the most restrictive of the current wave of official-language laws," and "is so far the most restrictive Official English measure." *See* D. Baron, *The English-Only Question* 21 (1990), and J. Crawford, *Hold Your Tongue* 176 (1992) (emphasis added).

¶40 In contrast to the Amendment, the official English laws that have been enacted in other states are for the most part brief and nonrestrictive. For instance, Colorado's official English law, Colo. Const. § 30, adopted by the initiative process, provides that the "English language is the official language of the State of Colorado. This section is self

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Ann. § 3-C:1 (1995); N.C. Gen. Stat. § 145-12 (1987); N.D. Cent. Code § 54-02-13 (1987); S.C. Code Ann. § 1-1-696 (1987); S.D. Codified Laws § 1-27-20 (1995); Tenn. Code Ann. § 4-1-404 (1984); Wyo. Stat. Ann. § 8-6-101 (Michie 1996).

[9] *See* Cecilia Wong, *Language is Speech: The Illegitimacy of Official English After* Yniguez v. Arizonans for Official English, 30 U.C. Davis L. Rev. 277, 278 (1996).

executing; however, the General Assembly may enact laws to implement this section." Similarly, the official English statute of Arkansas states: "(a) The English language shall be the official language of the State of Arkansas. (b) This section shall not prohibit the public schools from performing their duty to provide equal educational opportunities to all children." Ark. Stat. Ann. 1-4-117. Florida's 1988 official English law is similar: "(a) English is the official language of the State of Florida. (b) The legislature shall have the power to enforce this section by appropriate legislation." Fla. Const. Art. II, § 9 (1988). Indeed, three states have simply enacted a provision which declares that English is the official language of the state: Illinois, 5 Ill. Comp. Stat. Ann. § 460/20; Kentucky, Ky. Rev. Stat. § 2.013; and Indiana, Ind. Code Ann. § 1-2-10-1.

¶41 The more detailed official English laws contain provisions which avoid some of the constitutional questions presented by the Amendment. For instance, Wyoming's law provides, in pertinent part, that:

> (a) English shall be designated as the official language of Wyoming. Except as otherwise provided by law, no state agency or political subdivision of the state shall be required to provide any documents, information, literature or other written materials in any language other than English. (b) A state agency or political subdivision or its officers or employees may act in a language other than the English language for any of the following purposes: (i) To provide information orally to individuals in the course of delivering services to the general public . . . . (vii) To promote international commerce, trade or

tourism.

Wyo. St. 8-6-101.

¶42 Similarly, Montana's official English law protects the free speech rights of state employees and elected officials by allowing them to use non-English languages in the course and scope of their employment, stating in pertinent part:

> This section is not intended to violate the federal or state constitutional right to freedom of speech of government officers and employees acting in the course and scope of their employment. This section does not prohibit a government officer or employee acting in the course and scope of their employment from using a language other than English, including use in a government document or record, if the employee chooses.

Mont. Code Ann. § 1-1-510 (emphasis added) .

¶43 Finally, although California's official English law, passed as an initiative in 1986, is specific and lengthy, it does not prohibit the use of languages other than English.[10] If

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[10]California's Official English law, Cal. Const., Art. III, § 6, provides that:

(a) *Purpose*

English is the common language of the people of the United States of America and the State of California. This section is intended to preserve, protect and strengthen the English language, and not to supersede any of the rights guaranteed to the people by this Constitution.

(b) *English as the Official Language of California*

English is the official language of the State of California.

(c) *Enforcement*

The Legislature shall enforce this section by appropriate legislation. The Legislature and officials of the State of California shall take all steps necessary to insure that the role of English as the common language of the State of California is preserved and enhanced. The

Arizona's Amendment were merely symbolic or contained some of the express exceptions of the official English provisions discussed above, it might well have passed constitutional muster. We do not express any opinion concerning the constitutionality of less restrictive English-only provisions. We turn now to a discussion of the constitutional questions presented by the Amendment.

IV. Language is Speech Protected by the First Amendment

¶44 Unlike other English-only provisions, the Amendment explicitly and broadly prohibits government employees from using non-English languages even when communicating with persons who have limited or no English skills, stating that all "government officials and employees during the performance of government business" must "act in English and no other language." Amendment, §§ 1(3) (a) (iv), 3(1) (a). It also requires every level and branch of government to "preserve, protect and enhance the role of . . . English . . . as the official language" and prohibits all state and local entities from enacting or enforcing any "law, order, decree or policy which requires the use of a language other than English." §§ 2, 3(1) (b). We agree with the Ninth Circuit that the Amendment "could hardly be more inclusive" and that it "prohibit[s] the

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Legislature shall make no law which diminishes or ignores the role of English as the common language of the State of California.

(d) *Personal Right of Action and Jurisdiction of Courts*

Any person who is a resident of or doing business in the State of California shall have standing to use the State of California to enforce this section, and the Courts of record of the State of California shall have jurisdiction to hear cases brought to enforce this section. The Legislature may provide reasonable and appropriate limitations on the time and manner of suits brought under this section.

use in all oral and written communications by persons connected with the government of all words and phrases in any language other than English." *Yniguez v. AOE*, 69 F.3d at 933.

¶45 Assuming *arguendo* that the government may, under certain circumstances and for appropriate reasons, restrict public employees from using non-English languages to communicate while performing their duties, the Amendment's reach is too broad. For example, by its express language, it prohibits a public school teacher, such as Appellant Garcia, and a monolingual Spanish-speaking parent from speaking in Spanish about a child's education. It also prohibits a town hall discussion between citizens and elected individuals in a language other than English and also precludes a discussion in a language other than English between public employees and citizens seeking unemployment or workers' compensation benefits, or access to fair housing or public assistance, or to redress violations of those rights.

¶46 The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the government for a redress of grievances.

¶47 The First Amendment applies to the states as well as to the federal government. *Gitlow v. New York*, 268 U.S. 652, 665, 45 S.Ct. 625, 630 (1925). The expression of one's opinion is absolutely protected by the First and Fourteenth Amendments. *AMCOR Inv. Corp. v. Cox Ariz. Publications, Inc.*, 158 Ariz. 566, 568, 764 P.2d 327, 329 (App. 1988) (citation omitted); *see also Meyer v. Nebraska*, 262 U.S. 390,

401, 43 S.Ct. 625, 627 (1923) (stating that the United States Constitution protects speakers of all languages). The trial court held that the Amendment is content-neutral, and, therefore, does not violate the First Amendment. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S.Ct. 925, 929-30 (1986). That ruling is flawed.

¶48 "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838, 98 S.Ct. 1535, 1541 (1978) (footnote omitted) (quoting *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437 (1966). We note that the Amendment, Section 3, acknowledges that its mandate that government act only in English is superseded by the use of foreign languages in schools both to enable students to transition to English (subsection 2(a)) and to teach students a foreign language (subsection 2(c)). Subsection 2(b) states that the Amendment's English-only mandate does not apply in instances where foreign language use is required to ensure compliance with federal laws. Therefore, the Amendment would not apply, for instance, with regard to bilingual ballots in Arizona in designated political subdivisions as required by the Voting Rights Act, 42 U.S.C. §§ 1973 aa-la(c) (forbidding states from conditioning the right to vote on the ability to read, write, understand, or interpret English). Nor would it affect a criminal defendant's right to have a competent translator assist him, at state expense, if need be. *See United States ex rel. Negron v. New York*, 434 F.2d 386, 391 (2d Cir. 1970).

¶49 Notwithstanding these limited exceptions, we find that the Amendment unconstitutionally inhibits "the free

discussion of governmental affairs" in two ways. First, it deprives limited- and non-English-speaking persons of access to information about the government when multilingual access may be available and may be necessary to ensure fair and effective delivery of governmental services to non-English-speaking persons. It is not our prerogative to impinge upon the Legislature's ability to require, under appropriate circumstances, the provision of services in languages other than English. *See, e.g.*, A.R.S. § 23-906(D) (Providing that every employer engaged in occupations subject to Arizona's Workers' Compensation statutes shall post in a conspicuous place upon his premises, in English and Spanish, a notice informing employees that unless they specifically reject coverage under Arizona's compulsory compensation law, they are deemed to have accepted the provisions of that law). The United States Supreme Court has held that First Amendment protection is afforded to the communication, its source, and its recipient. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57, 96 S.Ct. 1817, 1822-23 (1976).

¶50 In his concurring opinion in *Barnes*, Justice Scalia stated, "[W]hen any law restricts speech, even for a purpose that has nothing to do with the suppression of communication . . . , we insist that it meet the high First-Amendment standard of justification." 501 U.S. at 576, 111 S.Ct. at 2465-66. The Amendment contravenes core principles and values undergirding the First Amendment - the right of the people to seek redress from their government - by directly banning pure speech on its face. By denying persons who are limited in English proficiency, or entirely lacking in it, the right to participate equally in the political process, the Amendment violates the constitutional right to participate in and have access to government, a right which is one of the

"fundamental principle[s] of representative government in this country." *See Reynolds v. Sims*, 377 U.S. 533, 560, 566-68, 84 S.Ct. 1362, 1381, 1383-85 (1964). The First Amendment right to petition for redress of grievances lies at the core of America's democracy. *McDonald v. Smith*, 472 U.S. 479, 482-83, 485, 105 S.Ct. 2787, 2790, 2791 (1985). *United Mine Workers of America v. Illinois State Bar Assn*, 389 U.S. 217, 222, 88 S.Ct. 352, 256 (1967) (right to petition is "among the most precious liberties safeguarded by the Bill of Rights"). In *Board of Education v. Pico*, 457 U.S. 853, 867, 102 S.Ct. 2799, 2808 (1982), the Court recognized that "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press and political freedom."

¶51 The Amendment violates the First Amendment by depriving elected officials and public employees of the ability to communicate with their constituents and with the public. With only a few exceptions, the Amendment prohibits all public officials and employees in Arizona from acting in a language other than English while performing governmental functions and policies. We do not prohibit government offices from adopting language rules for appropriate reasons. We hold that the amendment goes too far because it effectively cuts off governmental communication with thousands of limited-English-proficient and non-English-speaking persons in Arizona, even when the officials and employees have the ability and desire to communicate in a language understandable to them. Meaningful communication in those cases is barred. Under such circumstances, prohibiting an elected or appointed governmental official or an employee from communicating with the public violates the employee's and the official's rights. *See e.g., United States v. National Treasury*

Employees Union, 513 U.S. 454, 465-66, 115 S.Ct. 1003, 1012 (1995) (employee commenting on matters of public concern has right to speak, subject to considerations of governmental efficiency); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223, 109 S.Ct. 10013, 1020 (1989) (finding state law violates party officials' rights to spread political message to voters seeking to inform themselves on campaign issues). As the Ninth Circuit noted, the Amendment could "hardly be more inclusive"; it "prohibit[s] the use in all oral and written communications by persons connected with the government of all words and phrases in any language other than English." *Yniguez v. AOE*, 69 F.3d at 933.

¶52 Except for a few exceptions, the Amendment prohibits all elected officials from acting in a language other than English while carrying out governmental functions and policies. Several of the plaintiffs in this matter are elected state legislators, who enjoy the "widest latitude to express their views on issues of policy." *Bond v. Floyd*, 385 U.S. 116, 136, 87 S.Ct. 339, 349 (1966). Heretofore, when necessary in order to communicate effectively with their constituents, those legislators have spoken their constituents' primary language if those constituents do not speak English well, or at all.

¶53 Citizens of limited English proficiency, such as many of the named legislator's constituents, often face obstacles in petitioning their government for redress and in accessing the political system. Legislators and other elected officials attempting to serve limited-English-proficient constituents face a difficult task in helping provide those constituents with government services and in assisting those constituents in both understanding and accessing government. The Amendment makes the use of non-English communication to

accomplish that task illegal. In Arizona, English is not the primary language of many citizens. A substantial number of Arizona's
Native Americans, Spanish-speaking citizens, and other citizens for whom English is not a primary language, either do not speak English at all or do not speak English well enough to be able to express their political beliefs, opinions, or needs to their elected officials. Under the Amendment, with few exceptions, no elected official can speak with his or her constituents except in English, even though such a requirement renders the speaking useless. While certainly not dispositive, it is also worth noting that in everyday experience, even among persons fluent in English as a second language, it is often more effective to communicate complex ideas in a person's primary language because some words, such as idioms and colloquialisms, do not translate well, if at all. In many cases, though, it is clear that the Amendment jeopardizes or prevents meaningful communication between constituents and their elected representatives, and thus contravenes core principles and values undergirding the First Amendment.

¶54 AOE argues that the "First Amendment addresses [the] content not [the] mode of communication." The trial court adopted this argument, concluding that the Amendment was a permissible content-neutral prohibition of speech. Essentially, AOE argues that strict scrutiny should be reduced in this case because the decision to speak a non-English language does not implicate pure speech rights, but rather only affects the "mode of communication." By requiring that government officials communicate only in a language which is incomprehensible to non-English speaking persons, the Amendment effectively bars communication itself. Therefore, its effect cannot be characterized as merely a time, place, or

manner restriction because such restrictions, by definition, assume and require the availability of alternative means of communication. *E.g., Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746 (1989) (requiring the performance of a concert at a lower than desired volume); *see also Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118 (1984) (requiring the distribution rather than the posting of leaflets on public property).

¶55 AOE also argues that the Amendment can be characterized as a regulation that serves purposes unrelated to the content of expression and therefore should be deemed neutral, eve if it has an incidental effect on some speakers or messages but not others. *See Ward*, 491 U.S. at 791, 109 S.Ct. at 2754 (citing *City of Renton*, 475 U.S. at 47-48, 106 S.Ct. at 929-30). We agree with the Ninth Circuit's emphatic rejection in *Yniguez v. AOE* of the suggestion that the decision to speak in a language other than English does not implicate free speech concerns, but is instead akin to expressive conduct. There, the court said that "[s]peech in any language is still speech and the decision to speak in another language is a decision involving speech alone." 69 F.3d at 936. *See generally* Cecilia Wong, *Language is Speech: The Illegitimacy of Official English After* Yniguez v. Arizonans for Official English, 30 U.C. Davis L. Rev. 277, 278 (1996).

¶56 The United States Supreme Court has observed that "[c]omplete speech bans, unlike content-neutral restrictions on time, place or manner of expression, are particularly dangerous because they all but foreclose alternative means of disseminating certain information." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 506, 116 S.Ct. 1495, 1507 (1996) (internal citation omitted); *see also City of Ladue v.*

Gilleo, 512 U.S. 43, 55, 114 S.Ct. 2038, 2045 (1994) ("Our prior decisions have voiced particular concern with laws that foreclose an entire medium of expression.").

¶57 The Amendment poses a more immediate threat to First Amendment values than does legislation that regulates conduct and only incidentally impinges upon speech. *Cf. United States v. O'Brien*, 391 U.S. 367, 375-76, 382, 88 S.Ct. 1673, 1678, 1681-82 (1968) (statute prohibiting knowing destruction or mutilation of selective service certificate did not abridge free speech on its face); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-94, 104 S.Ct. 3065, 3068-69 (1984) (National Park Service regulation forbidding sleeping in certain areas was defensible as a regulation of symbolic conduct or a time, place, or manner restriction). Laws "directed at speech" and communication are subject to exacting scrutiny and must be "justified by the substantial showing of need that the First Amendment requires." *Texas v. Johnson*, 491 U.S. 397, 406, 109 S.Ct. 2533, 2541 (1989) (citations omitted); *accord First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407, 1421 (1978); *Buckley v. Valeo*, 424 U.S. 1, 16-17, 96 S.Ct. 612, 633 (1976). Here, the drafters of the Amendment articulated the need for its enactment as promoting English as a common language. The Legislative Council's official argument in favor of the Amendment stated: "The State of Arizona is at a crossroads. It can move toward the fears and tensions of language rivalries and ethnic distrust, or it can reverse this trend and strengthen our common bond, the English language."

¶58 Even if the Amendment were characterized as a content- and viewpoint-neutral ban, and we hold such a characterization does not apply, the Amendment violates the

First Amendment because it broadly[11] infringes on protected speech. *See National Treasury Employees Union*, 513 U.S. at 470, 115 S.Ct. at 1015 (striking down content-neutral provisions of Ethics Reform Act due to significant burdens on public employee speech and on the "public's right to read and hear what Government employees would otherwise have written and said"). In *National Treasury Employees Union*, the Court recognized that a ban on speech *ex ante* (such as that imposed by the Amendment) constitutes a "wholesale deterrent to a broad category of expression by a massive number of potential speakers" and thus "chills potential speech before it happens." *Id.* at 467-68, 115 S.Ct. at 1013-14 (footnote omitted) (citation omitted); *see also City of Ladue*, 512 U.S. at 55, 114 S.Ct. at 2045 (holding that even content- and viewpoint-neutral laws can "suppress too much speech"). *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574, 107 S.Ct. 2568, 2572 (1987) (viewpoint neutral regulation held unconstitutional because it "prohibited *all* protected expression").

¶59 The chilling effect of the Amendment's broad applications is reinforced by Section 4 which provides that elected officials and state employees can be sued for violating the Amendment's prohibitions. *See* Appendix. We conclude that the Amendment violates the First Amendment.

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[11]We do not address the plaintiffs' separate overbreadth claim because we hold that the Amendment unconstitutionally infringes on First Amendment rights. Overbreadth should only be addressed where its effect might be salutary. *Massachusetts v. Oakes*, 491 U.S. 576, 581-82, 109 S.Ct. 2633, 2636-37 (1987); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916 (1973) (holding that applying overbreadth analysis constitutes manifestly strong medicine that is to be employed sparingly and only as a last resort).

V. Equal Protection

¶60 Section One of the Fourteenth Amendment provides, in pertinent part, that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The right to petition for redress of grievances is one of the fundamental rights guaranteed by the First Amendment. *United Mine Workers*, 389 U.S. at 222, 88 S.Ct. at 356 (right to petition for redress of grievances is among the most precious of the liberties safeguarded by the Bill of Rights). A corollary to the right to petition for redress of grievances is the right to participate equally in the political process. *See Reynolds*, 377 U.S. at 560, 556-68, 84 S.Ct. at 1380, 1379-85 (concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged); *accord Evans v. Romer*, 854 P.2d 1270, 1276 (Colo. 1993) ("the Equal Protection Clause guarantees the fundamental right to participate equally in the political process and . . . any attempt to infringe on an independently identifiable group's ability to exercise that right is subject to strict judicial scrutiny"); *see also Dunn v. Blumstein*, 405 U.S. 330, 335, 92 S.Ct. 995, 1000 (1972) (recognizing fundamental right to participate in state elections on an equal basis with other citizens in the jurisdiction).

¶61 The Amendment is subject to strict scrutiny because it impinges upon the fundamental First Amendment right to petition the government for redress of grievances. *United Mine Workers*, 389 U.S. at 222, 88 S.Ct. at 356. The right to petition bars state action interfering with access to the legislature, the executive branch and its various agencies, and the judicial branch. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-39, 81 S.Ct. 523, 529-31 (1961) (legislature); *United Mine Workers v.*

Pennington, 381 U.S. 657, 85 S.Ct. 1585 (1965) (executive); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609 (1972) (administrative agencies and courts); *United Mine Workers*, 389 U.S. at 221-22, 88 S.Ct. at 355-56 (courts).

¶62 The trial court rejected plaintiffs' equal protection argument on the grounds that plaintiffs had not shown that the Amendment was driven by discriminatory intent. *See Hunter v. Underwood*, 471 U.S. 222, 229, 105 S.Ct. 1916, 1921 (1985). Because the Amendment curtails First Amendment rights, however, it is presumed unconstitutional and must survive this court's strict scrutiny.[12] *See generally Rosen*, 641 F.2d at 1246. AOE and the state defendants bear the burden of establishing the Amendment's constitutionality by demonstrating that it is drawn with narrow specificity to meet a compelling state interest. *Id.*

¶63 Challenges to official English pepper history, but, except for its decision in *Yniguez* which was dismissed on standing, the United States Supreme Court has not addressed the constitutionality of official English statutes since the 1920s. In *Meyer*, 262 U.S. 390, 43 S.Ct. 625,[13] the Court

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[12]Because strict scrutiny analysis applies to the governmental regulation of speech imposed by the Amendment, we do not address whether a language minority constitutes a suspect class for equal protection purposes. *See San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278 (1973) (describing the criteria characterizing suspect classification for equal protection purposes).

[13]We recognize that in *Yniguez v. AOE* the Ninth Circuit relied upon *Meyer* in concluding that the Amendment violated the First Amendment. 69 F.3d at 945-48 (citing *Meyer*, 262 U.S. at 403, 43 S.Ct. at 626). We note, however, that *Meyer* was decided two years before the Court applied the First Amendment to the states through the Fourteenth Amendment. *Gitlow*, 268 U.S. 652, 45 S.Ct. 625. While we hold that

reviewed a statute forbidding any teacher to "teach any subject to any person in any language other than the English language." The Court held that teachers have the constitutional right to teach, and students have the equivalent right to receive, foreign language instruction. *Id.* at 400-03, 43 S.Ct. at 627-28. In so doing, the Court noted:

> [T]he individual has certain fundamental rights which must be respected. *The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.* Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution - a desirable end cannot be promoted by prohibited means.

Id. at 401, 43 S.Ct. at 627 (emphasis added).

¶64 In *Meyer*, the Court held that the statute violated Fourteenth Amendment due process and equal protection rights. Specifically, the Court held that the Nebraska statute, by forbidding foreign language instruction, was arbitrary and did not reasonably relate to any end within the competency of the state to regulate. *Id.* at 403, 43 S.Ct. at 628. The Court acknowledged that a state has legitimate interests in promoting the civic development of its citizens and that a uniform language might aid this promotion. *Id.* at 401, 43

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the Amendment violates the First Amendment, we rely on the decisions previously discussed and we do not reach the issue of whether *Meyer* offers speech any particular protection under the First Amendment. *See* Howard O. Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court from 1791-1930*, 35 Emory L.J. 59, 117, 128 (1986) (stating that *Meyer* does not offer speech any particular protection).

S.Ct. at 627. The Court held, however, that the statute abrogated the fundamental, individual right of choice of language. *Id.* at 403, 43 S.Ct. at 628. Despite its desirable goals, the Nebraska statute was held to employ prohibited means exceeding the state's power. *Id.* at 402, 43 S.Ct. at 628. The discriminatory Nebraska law, as applied, thus deprived both teachers and students of their liberty without due process of law. *Id.* at 400-02, 43 S.Ct. at 627-28. We believe the Amendment suffers from the same constitutional infirmity.

¶65 As discussed previously, the compelling state interest test applies to the Amendment because it affects fundamental First Amendment rights. Even assuming *arguendo* that AOE and the state defendants could establish a compelling state interest for the Amendment (and they have not met that burden), they cannot satisfy the narrow specificity requirement. Under certain very restricted circumstances, states may *regulate* speech. *See e.g., Kovacs v. Cooper*, 336 U.S. 77, 80, 69 S.Ct. 448, 450 (1949) (the First Amendment permits regulation of the time, place, and manner of the use of sound trucks). However, the Amendment is not a "regulation." Rather, it is a *general prohibition* of the use of non-English languages by all state personnel during the performance of government business and by all persons seeking to interact with all levels of government in Arizona. The Amendment's goal to promote English as a common language does not require a general prohibition on non-English usage. English can be promoted without prohibiting the use of other languages by state and local governments. Therefore, the Amendment does not meet the compelling state interest test and thus does not survive First Amendment strict scrutiny analysis.

¶66 Finally, we note that any interference with First

Amendment rights need not be an absolute bar to render it unconstitutional as violating equal protection; a substantial burden upon that right is sufficient to warrant constitutional protections. By permanently implementing a linguistic barrier between persons and the government they have a right to petition, the Amendment substantially burdens First Amendment rights. *See Eastern R.R. Presidents Conference*, 365 U.S. at 137, 81 S.Ct. at 529 ("The whole concept of representation depends upon the ability of the people to make their wishes known to their representatives"). Therefore, the Amendment violates the Fourteenth Amendment's guarantees of equal protection because it impinges upon both the fundamental right to participate equally in the political process and the right to petition the government for redress.

VII. Severability

¶67 In an effort to salvage the Amendment, the Attorney General urges us to hold that only Sections 1(2) and 3(1)(a) are unconstitutional and to sever the remaining portions. In Arizona, an entire statute (in this case, a constitutional provision) need not be declared unconstitutional if constitutional portions can be separated. *Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143, 151, 800 P.2d 1251, 1259 (1990). However, the valid portion of the statute will be severed only if it can be determined from the language that the voters would have enacted the valid portion absent the invalid portion. *State Compensation Fund v. Symington*, 174 Ariz. 188, 195, 848 P.2d 273, 280 (1993). We hold that the Amendment is not capable of such judicial surgery, and we decline to sever the invalid portions of the Amendment. We do so, first, because the Amendment does not contain a severability clause and, second, because the record is devoid of evidence that the voters would have enacted such a

rewritten and essentially meaningless amendment. *See Campana v. Arizona State Land Dep't*, 176 Ariz. 288, 294, 860 P.2d 1341, 1347 (1993) ("A statute or provision is severable if the valid and invalid portions are not so intimately connected as to raise the presumption that the legislature would not have enacted the one without the other and if the invalid portion was not the inducement for the passage of the entire act") (citations omitted).

¶68 It is not possible to sanitize the amendment in order to narrow it sufficiently to support its constitutionality. We have not way of knowing, aside from mere speculation, whether the people would have passed the two sections that declare English as the official language and require that all acts of government be conducted in English. Moreover, even if those two provisions alone had been passed, it would be an unjustified stretch to insert the word "official" before the word "act" as the Attorney General now proposes. Therefore, we hold that the Amendment does not lend itself to severability.

CONCLUSION

¶69 The Attorney General's attempt to narrow the construction and application of the Amendment is irreconcilable with both the Amendment's plain language and its legislative history. Thus, that construction cannot be used to obviate the Amendment's unconstitutionality or to cure its overbreadth. The Amendment is not content-neutral; rather, it constitutes a sweeping injunction against speech in any language other than English. The Amendment unconstitutionally infringes upon multiple First Amendment interests - those of the public, of public employees, and of elected officials.

¶70 The Amendment adversely affects non-English

speaking persons and impinges on their ability to seek and obtain information and services from government. Because the Amendment chills First Amendment rights that government is not otherwise entitled to proscribe, it violates the Equal Protection Clause of the Fourteenth Amendment. The Amendment's constitutional infirmity cannot be salvaged by invoking the doctrine of severability.

¶71 We expressly note that we do not undertake to define the constitutional parameters of officially *promoting* English, as distinguished from banning non-English speech. Our holding does not question or denigrate efforts to encourage English as a common language; but such efforts must not run afoul of constitutional requirements and individual liberties. Nor is the constitutionality of a less comprehensive English-only provision before us.

¶72 Significantly, in finding the Amendment unconstitutional, we do not hold, or even suggest, that any governmental entity in Arizona has a constitutional obligation to provide services in languages other than English, except, of course, to the extent required by federal law.

¶73 The opinion of the court of appeals is vacated and the trial court's judgment is reversed. This matter is remanded with directions to enter judgment in accordance with this opinion.

James Moeller, Justice

CONCURRING:
Thomas A. Zlaket, Chief Justice
Charles E. Jones, Vice Chief Justice
Stanley G. Feldman, Justice

MARTONE, Justice, specially concurring.

¶74 A word of caution is in order. The posture of this case is unusual. The plaintiffs here have never faced actual or threatened injury because the defendants take the position that the English Only Amendment is narrow and applies only to official acts. Not content with this narrowing construction, the plaintiffs have taken the position that the Amendment is not limited to official acts and is broad enough to include even legislator-constituent communications. The defendants, however, do not raise a standing or case or controversy defense, and we are left to wonder about its proper resolution.

¶75 There is yet a second layer of potential case or controversy question in this case. The defendants concede that if the Amendment is interpreted as broadly as suggested by plaintiffs, then it is unconstitutional. And yet the plaintiffs take the position that if the Amendment is as narrow as the defendants say it is (i.e., applies only to official acts), then it is not unconstitutional. This leaves us with plaintiffs arguing that it is unconstitutional because of its breadth, but no one arguing that it is constitutional notwithstanding its breadth. We thus have no adversariness in connection with the ultimate federal constitutional question. *Cf.* U.S. Const. art. III, § 2 (requiring the existence of a "case" or "controversy" for federal adjudication); *see, e.g., Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1067-69, 1075 (1997) (remanding case for dismissal for lack of case or controversy). To illustrate, the en banc opinion of the United States Court of Appeals for the Ninth Circuit in *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), was decided by a 6-5 vote, but the contentions of the five dissenting judges in the court of appeals have not been made

in this court because the defendants agree with the plaintiffs that if the Amendment is broadly construed, it is unconstitutional.

¶76 It is likely, therefore, that were we an Article III court, we would have had to dismiss this case for lack of case or controversy. We are not unaware of a disquieting paradox: because of the lack of adversity, there is a greater risk of error -- yet that same lack of adversity diminishes the likelihood of further judicial review.

Frederick J. Martone, Justice

APPENDIX

Article XXVIII of the Arizona Constitution provides as follows:

ARTICLE XXVIII. ENGLISH AS THE OFFICIAL LANGUAGE

§ 1. English as the official language; applicability

Sec. 1. (1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3) (a) This Article applies to:

(i) the legislative, executive and judicial branches of government.

(ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities.

(iii) all statutes, ordinances, rules, orders, programs and policies.

(iv) all government officials and employees during the performance of government business.

(b) As used in this Article, the phrase, "This State and all political subdivisions of this State" shall include every entity, person, action or item described in this Section, as appropriate to the circumstances.

§ 2. Requiring this state to preserve, protect and enhance English

Sec. 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona.

§ 3. Prohibiting this state from using or requiring the

use of languages other than English; exceptions

Sec. 3. (1) Except as provided in Subsection (2):

(a) this State and all political subdivisions of this State shall act in English and in no other language.

(b) no entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) no governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances:

(a) to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.

(b) to comply with other federal laws.

(c) to teach a student a foreign language as part of a required or voluntary educational curriculum.

(d) to protect public health or safety.

(e) to protect the rights of criminal defendants or victims of crime.

§ 4. Enforcement; standing

Sec. 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARMANDO RUIZ, LINDA AGUIRRE, JOHN PHILIP EVANS, ROSIE GARCIA, CANDIDO MERCADO, MANUEL PENA, JR., PETER RIOS, MACARIO SALDATE IV, FEDERICO SANCHEZ and VICTOR SOLTERO,
Plaintiffs-Appellants-Cross-Appellees,

v.

ARIZONANS FOR OFFICIAL ENGLISH and ROBERT D. PARK,
Intervenors, Defendants-Appellees-Cross-Appellants.

1 CA-CV 94-0235
DEPARTMENT A
O P I N I O N
Appeal from the Superior Court of Maricopa County
Cause No. CV 92-19603
The Honorable Jeffrey S. Cates

AFFIRMED IN PART; REVERSED IN PART

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WEISBERG, Judge

Plaintiffs appeal the trial court's grant of summary judgment in favor of Defendants State of Arizona, Fife Symington III, Governor of Arizona, Grant Woods, Attorney General of Arizona, and Intervenors Arizonans for Official English and Robert D. Park (AOE). Intervenors cross-appeal the trial court's denial of their motion for attorneys' fees. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL HISTORY

In November 1988, Arizona enacted, by voter initiative, Article XXVIII (Article 28) of the Arizona Constitution:

ARTICLE XXVIII.
ENGLISH AS THE OFFICIAL LANGUAGE

1. *English as the Official Language; Applicability.*

Section 1. (1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3) (a) This Article applies to:

(i) the legislative, executive and judicial branches of the government,

(ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities,

(iii) all statutes, ordinances, rules, orders, programs and polities,

(iv) all government officials and employees during the performance of government business.

(b) As used in this Article, the phrase "This State and all political subdivisions of this State" shall include every entity, person, action or item described in this section, as appropriate to the circumstances.

2. *Requiring This State to Preserve, Protect and Enhance English.*

Section 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona.

3. *Prohibiting This State from Using or Requiring the Use of Languages Other Than English; Exceptions.*

Section 3. (1) Except as provided in Subsection (2):

(a) This State and all political subdivisions of this State shall act in English and in no other language.

(b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances:

(a) to assist students who are not proficient in the English language; to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.
(b) to comply with other federal laws.
(c) to teach a student a foreign language as part of a required or voluntary educational curriculum.
(d) to protect public health or safety.
(e) to protect the rights of criminal defendants or victims of crime.
4. *Enforcement; Standing.*
Section 4. A person who resides in or does business in this State shall have standing ro bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

In November 1988, Maria Yniguez, a bilingual state employee who communicated in both English and Spanish while at work, filed an action in federal district court against the State, Governor, and Attorney general of Arizona. She sought an injunction against the enforcement of Article 28 and a declaration that it violated the First and Fourteenth Amendments of the United States Constitution and federal civil rights laws.

In January 1989, Bob Corbin, the Arizona Attorney General at that time, issued his interpretation of Article 28. He concluded that the text of Article 28 did not require a broad ban on any non-English language because the use of other languages would not be prohibited in rendering government services. Instead, he reasoned, Article 28 required only that, as the official language of Arizona, English be used to conduct the official acts of the government.

Op.Atty. Gen.AZ. No. I89-009 (1989).

In *Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz. 1990), the district court disagreed with the attorney general and interpreted Article 28 to forbid all government officers and employees from using any language other than English in the course of their government duties with the exception of the limited areas set out in section 3(2). So interpreted, the district court found that Article 28 was facially overbroad and violated the First Amendment. The injunction, however, was denied since there was no enforcement action pending against Yniguez.

The state defendants were satisfied with the judgment and chose not to appeal to the Ninth Circuit. AOE, however, the principal sponsors of the initiative to enact Article 28, intervened as defendants so they could pursue the appeal. The Attorney General was also allowed to intervene for the limited purpose of arguing for his interpretation of Article 28 or, alternatively, for the certification of the interpretation of Article 28 to the Arizona Supreme Court pursuant to Ariz. Rev. Stat. Ann. ("A.R.S.") section 12-1861. Arizonans Against Constitutional Tampering (AACT), the principal opponents of the ballot initiative, were allowed to intervene as plaintiffs.

In *Yniquez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), the Ninth Circuit refused to certify the question to the Arizona Supreme Court, and agreed with the district court that Article 28 was facially overbroad. Shortly after the ninth Circuit issued its opinion, AOE filed a petition for a writ of certiorari in the United States Supreme Court, which was granted. 116 S. Ct. 1316 (Mar. 26, 1996).

In November 1992, the ten plaintiffs in the instant case brought an action on superior court against the

Governor and Attorney General of Arizona.[1] They sought a declaratory judgment that Article 28 violates the First, Ninth, and Fourteenth Amendments to the United States Constitution. The plaintiffs are four state elected officials, five state employees, and one private citizen. They are all bilingual and regularly communicate in both Spanish and English as private citizens and during the performance of government business. At least four of the plaintiffs are members of AACT, including Armando Ruiz, who is the chair of that group. AOE intervened as a defendant shortly after the complaint was filed and thereafter was the primary defending litigant.

AOE moved for summary judgment. Plaintiffs responded and filed a cross-motion. The trial court granted AOE's motion, finding that Article 28:

1. is a content-neutral regulation that does not violate the First Amendment,
2. does not violate the Equal Protection Clause of the Fourteenth Amendment because there is no proof of discriminatory intent, and
3. does not violate the Ninth Amendment because such does not protect choice of language.

AOE moved for an award of attorneys' fees pursuant to A.R.S. section 12-2030. The court denied the motion finding that section 12-2030 did not apply since AOE had not brought the action, and it was not in the nature of a petition for writ of mandamus.

Plaintiffs now appeal arguing that Article 28 should be interpreted as a blanket prohibition against all government

---

[1]Plaintiffs later added the State of Arizona as a defendant in their first amended complaint.

employees using any language other than English in the performance of any government business. As such, they reason, Article 28 is a content-based regulation of speech that is contrary to the First Amendment. Plaintiffs also argue that Article 28 constitutes intentional discrimination against non-English speaking minorities and violates the Equal Protection Clause of the Fourteenth Amendment.

AOE answers that Article 28 should be narrowly construed as requiring the use of English only for official, binding government acts. So construed, they argue, Article 28 does not violate either the First or Fourteenth Amendments. AOE also cross-appeals the denial of their attorneys' fees.

Being mindful of the *Yniquez* litigation, this court requested additional briefing from the parties on the issues of collateral estoppel and comity.

DISCUSSION

Judicial comity is an equitable principle, not a rule of law, in which courts of one state or jurisdiction give effect to the "judicial decisions of another, not as a matter of obligation[,] but out of deference and respect." *Bobala v. Bobala*, 33 N.E.2d 845, 848 (1940). "Comity between federal and state courts is necessary to prevent . . . unseemly conflicts of jurisdiction and to promote a decent and orderly administration of justice. [It] reflects sound public policy and should be applied in a spirit of liberality." 21 C.J.S. *Courts* § 210 (1990).

Both comity and federalism concerns underlie the various federal doctrines that have developed regarding abstention, *see e.g.*, *Webb v. Webb*, 451 U.S. 493, 499-500 (1981); *Ohio Bureau of Employment Serv. v. Hodory*, 431 U.S. 471, 477 (1977), and the less cumbersome alternative of

certification, *see Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 396 (1988); *Bellotti v. Baird*, 428 U.S. 132, 146-48 (1976). In *Yniquez*, the Ninth Circuit refused to abstain and certify the question of Article 28's proper interpretation to the Arizona Supreme Court, although the issue was pending in our state court system. The court found that abstention was inappropriate because the case involved a First Amendment challenge and because Article 28 was not obviously susceptible to a limiting construction. 69 f.3d at 930-31; *cf. Brocket v. Spokane Arcades, Inc.*, 472 U.S. 491, 507-10 (1985) (O'Connor, J. concurring); *Almodovar v. Reiner*, 832 F.2d 1138, 1140 (9th Cir. 1987).

This court is now placed in the difficult position of deciding whether to reach the merits of this case or whether to defer to the pending federal adjudication. Comity, in the context of federal-state relations, more typically applies when a federal court finds that deference to a state court, on an issue of state law, is proper. States, however, should also defer, when appropriate, to federal courts. In *Bouwman v. Dept of Social Servs.*, 375 N.W.2d 806, 808 (Mich. App. 1985), a state court held that principles of comity required it to defer to a federal court decision concerning the interpretation and constitutionality of a state social services regulation. *See also Hall v. Nomura Sec. It'l*, 268 Cal. Rptr. 45, 49 (App. 1990) (while lower federal court decisions are not binding, they are entitled to great weight); *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1244 (N.J. 1990) (judicial comity affording deference to federal court decisions ensures uniformity of law and discourages forum shopping); *Van de Hay v. United States Nat'l Bank*, 793 P.2d 1388, 1390 (App. 1990) (noting the "practical advantages" of adopting the same statutory interpretation as a federal court), *aff'd on other grounds*, 829 P.2d 695 (Or. 1992).

In these circumstances, we conclude that it is appropriate for us to exercise our discretion and defer to the federal litigation and thereby accept the construction of Article 28 and the analysis that was set forth by the Ninth Circuit. Such deference promotes uniformity in interpretation of the law and discourages the parties from forum shopping. Further, the United States Supreme Court may choose to address the constitutionality of Article 28 and put both *Yniquez* and the instant case to rest.

We affirm the trial court's denial of AOE's attorneys' fees.

CONCLUSION

We exercise our discretion and accept the opinion of the Ninth Circuit. The judgment of the trial court is reversed as to Article 28 and affirmed as to the denial of AOE's attorneys' fees.

Sheldon H. Weisberg, Presiding Judge

CONCURRING:
Philip E. Toci, Judge
William F. Garbarino, Judge

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY
January 24, 1994
HON. JEFFREY S. CATES

Clerk of the Court — N. Devereux, Deputy
Nº CV 92-19603

ARMANDO RUIZ, et. al. — Stephen G. Montoya
v.

STATE OF ARIZONA, et al. — Attorney General
by: Thomas I. McClory

James F. Henderson

Plaintiffs challenge the constitutionality of Article XXVIII to the Arizona Constitution alleging that Article XXVIII: violates Plaintiffs' freedom of speech under the First Amendment to the United States Constitution; is facially overbroad; violates the Equal Protection Clause to the United States Constitution; and violates Plaintiffs' rights under the Ninth Amendment to the United States Constitution.

I. FREEDOM OF SPEECH:

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment prohibits the government from

proscribing speech or expressive conduct due to disapproval of the ideas expressed. *Police Department of City of Chicago v. Mosley*, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d (1972). Content-based regulation of expression, however, has been upheld in some instances. *See F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978); *Layman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974).

A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). This Court concludes that Article XXVIII is content-neutral, and therefore does not violate the First Amendment to the Unites States Constitution.

II. FACIALLY OVERBROAD:

A law is not facially overbroad unless it reaches constitutionally protected conduct. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). Based on this court's ruling above that Article XXVIII does not violate constitutionally protected free speech rights, this court concludes that Article XXVIII cannot be facially overbroad as it does not reach constitutionally protected conduct.

III. EQUAL PROTECTION:

Plaintiffs argue that Article XXVIII violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it discriminates against all Hispanics and other ethnic minorities, such as Asians and indigenous peoples.

In order to show a violation of the Equal Protection Clause, there must be proof of a racially discriminatory intent or purpose. *Hunter v. Underwood*, 471 U.S. 222, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985) (citation omitted). There is nothing in the record to show such an intent or purpose. This court therefore concludes that Article XXVIII does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

IV. NINTH AMENDMENT:

Plaintiffs further argue that the right of a constituent to communicate with his/her elected official in the language of choice is protected by the Ninth Amendment to the United States Constitution.

The rights protected by the Ninth Amendment are those that are fundamental; rights not specifically enumerated but encompassed within the penumbra of the enumerated rights, and have been classified as matters relating to marriage, procreation, contraception, family relationships and child rearing. *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1976); *United States v. Choate*, F.2d 1965 (9th Cir. 1978). This Court concludes that the right to communicate in the language of choice does not fall within the rights protected by the Ninth Amendment.

Based on the foregoing,

IT IS ORDERED granting the Motion for Summary Judgment of Intervenors-Defendants Arizonans for Official English Committee and Robert D. Park.

FURTHER ORDERED denying Plaintiffs' Cross-Motion for Summary Judgment.

HON. JEFFREY S. CATES

(2)

No. 98-167

Supreme Court, U.S.
FILED
NOV 16 1998
CLERK

In The

Supreme Court of the United States

October Term, 1998

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,

Petitioners,

v.

STATE OF ARIZONA; JANE DEE HULL, GOVERNOR OF ARIZONA; GRANT WOODS, ATTORNEY GENERAL OF ARIZONA; ARMANDO RUIZ; LINDA AGUIRRE; JOHN PHILIP EVANS; ROSIE GARCIA; CANDIDO MERCADO; MANUEL PENA, JR.; PETER RIOS, JR.; MACARIO SALDATE IV; FEDERICO SANCHEZ; AND VICTOR SOLTERO,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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22pp

QUESTION PRESENTED

Before considering the question presented by the Petitioners, the Court should consider the following question:

> Do Petitioners, who are the sponsors of the initiative that became Article XXVIII and an individual who voted for the initiative, have Article III standing to appeal the Arizona Supreme Court's decision finding that Article XXVIII violates the Constitution?

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INTRODUCTION

Pursuant to the Court's Order requesting Respondents to respond to the Petition for Certiorari filed by Arizonans for Official English and Robert D. Park, Respondents, the State of Arizona, the Arizona Governor, and the Arizona Attorney General ("State Defendants"), respectfully request the Court to deny the Petition because Petitioners do not have standing to pursue this action.

STATEMENT OF THE CASE

This case concerns Article XXVIII of the Arizona Constitution, the Official English Amendment, which the Arizona Supreme Court determined was unconstitutional, and whether Petitioners, who merely sponsored the initiative that became Article XXVIII and who intervened below, have standing to seek certiorari in this Court from the Arizona decision when the State Defendants have decided not to appeal.

A. Article XXVIII

In October 1987, Petitioners, Arizonans for Official English (AOE), a campaign committee, and its spokesman, Robert D. Park, launched an initiative drive to amend the Arizona Constitution to designate English as the State's official language and to limit state and local government employees' work-time use of any language other than English. (Pet. App. 7a.) In November 1988,

Arizona voters narrowly approved the initiative, which became Article XXVIII of the Arizona Constitution. *Id.*[1]

On January 24, 1989, the Arizona Attorney General issued a formal, published opinion concluding that Article XXVIII could be construed to avoid a conflict with the federal Constitution, and if so construed, Article XXVIII would not affect the delivery of state services in a language other than English:

> We do not conclude that [Article XXVIII] requires a diminution or unreasonable restriction of services or the placing of barriers to access to governmental processes for non-English speakers, because such an interpretation is not required by the text of the amendment itself and could be inconsistent with applicable federal law and the Arizona and United States Constitutions.

Ariz. Att'y Gen. Op. 189-009 (1989). If, on the other hand, Article XXVIII were construed to apply to the day-to-day delivery of governmental services, the Attorney General opined that it could be found unconstitutional:

> We do not interpret [Article XXVIII] as necessitating elimination of assistance provided by government in languages other than English where such assistance is reasonably needed to ensure fair and effective delivery of governmental services to non-English speakers. If this were required, [Article XXVIII] could be found to give governmental effect to private biases by taking away protections legitimately offered to those entitled to them, and thus would be

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[1] The text of Article XXVIII appears in Petition at x-xii.

> voided as a violation, not only of Title VI, but also of the federal and state equal protection clauses.

Ariz. Att'y Gen. Op. 189-009 (1989) (footnote omitted). The Attorney General also opined that "an elected official may have a federal first amendment right to communicate with constituents in the language of choice," and that Article XXVIII should be construed to avoid that conflict. *Id.*

B. The Federal Lawsuit

Shortly after Article XXVIII was passed, a state employee challenged its constitutionality pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of Arizona. The district court found that Article XXVIII reached a substantial amount of conduct protected by the First Amendment and that therefore Article XXVIII was overbroad and unconstitutional on its face. *Yniguez v. Mofford*, 730 F.Supp. 309, 313-14 (D. Ariz. 1990). The Court of Appeals for the Ninth Circuit affirmed the finding of unconstitutionality in *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (en banc) ("*Yniguez*").

AOE and Robert D. Parks, who had intervened in the federal matter in the Ninth Circuit, filed a petition for certiorari in this Court. After granting certiorari, this Court vacated the Ninth Circuit decision, finding that the plaintiff's case was moot because she was no longer employed by the State. *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997) ("*AOE*"). The Court stopped short of resolving whether AOE and Park have standing

under Article III to pursue appellate review, but expressed "grave doubts" concerning their standing. *Id.* at 1068.

C. This State Court Challenge

In November 1992, the ten Plaintiffs in the instant case sued the Arizona Governor and the Arizona Attorney General in the Arizona Superior Court for Maricopa County, seeking a declaratory judgment that Article XXVIII violates the First, Ninth, and Fourteenth Amendments to the United States Constitution. Plaintiffs – four state elected officials, five state employees, and one private citizen – are bilingual and regularly communicate in both Spanish and English as private citizens and during the performance of government business. Plaintiffs amended their Complaint to add the State of Arizona as a Defendant.

AOE and Park moved to intervene pursuant to Rule 24(a)(2) of the Arizona Rules of Civil Procedure (which is identical to Rule 24(a)(2) of the Federal Rules of Civil Procedure). AOE asserted that it was entitled to intervene because of the money and labor that it expended in promoting the initiative that became Article XXVIII. Park claimed that he had a legally protectable interest in that his vote could be cancelled if the state court found Article XXVIII unconstitutional. No one opposed AOE and Park's Motion to Intervene, and the superior court granted the motion.

On Cross-Motions for Summary Judgment, the superior court ruled that Article XXVIII is constitutional, finding that it (1) is a content-neutral regulation that does not

violate the First Amendment; (2) does not violate the Equal Protection Clause of the Fourteenth Amendment because there is no proof of discriminatory intent; and (3) does not violate the Ninth Amendment because it does not protect choice of language.

On appeal, the Arizona Court of Appeals reversed (before this Court decided *AOE*), choosing to defer to the Ninth Circuit's decision in *Yniguez* by adopting both the Ninth Circuit's construction of Article XXVIII and its analyses and conclusion that Article XXVIII is unconstitutional. *Ruiz v. Symington*, 1996 WL 309512 (Ariz. App. 1996) (Pet. App. 49a to 58a).

The State Defendants then petitioned the Arizona Supreme Court to review the Court of Appeal's decision. The court granted review and stayed all proceedings pending this Court's decision in *AOE*. After this Court's decision vacating the Ninth Circuit decision, the Arizona Supreme Court lifted the stay, heard argument, and issued its decision. *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998) (Pet. App. 1a to 48a).

Throughout the state court litigation, the State Defendants argued, consistently with the Attorney General's formal opinion, that Article XXVIII applies to "official governmental acts, but not to day-to-day communication of government employees." (State Defendants' Supplemental Brief in the Arizona Supreme Court at 1.) AOE and Parks also argued that Article XXVIII only applies to official, binding acts of the State and does not prohibit translations. *Ruiz* at ¶ 3. The Arizona Supreme Court, however, rejected this narrow interpretation, agreeing with the Ninth Circuit that the Amendment "could

hardly be more 'inclusive' and that it 'prohibit[s] the use in all oral and written communications by persons connected with the government of all words and phrases in any language other than English.' " *Id.* at ¶ 44 (quoting *Yniguez*, 69 F.3d at 933). The Arizona Supreme Court thus concluded that, given the broad construction, Article XXVIII violates the First Amendment by "depriv[ing] limited- and non-English-speaking persons of access to information about the government when multilingual access may be available and may be necessary to ensure fair and effective delivery of govermental services to non-English-speaking persons," and "depriving elected officials and public employees of the ability to communicate with their constituents and the public." *Id.* at ¶¶ 49, 51. The court also found that Article XXVIII violates the Equal Protection Clause by impinging on the "First Amendment right to petition the government for redress of grievances." *Id.* at ¶¶ 61, 65.

THE COURT SHOULD DENY THE PETITION

A. Petitioners Lack Standing to Maintain This Appeal Absent State Participation.

Petitioner AOE is an unincorporated association – a committee – which promoted the initiative that became Article XXVIII. Park is AOE's Chairman and an individual who claims to have voted for adoption of Article XXVIII. This Court expressed "grave doubts about whether AOE and Park have standing under Article III to pursue appellate review" in *AOE*, 117 S.Ct. at 1068, but did not definitely resolve the issue because the plaintiff's

claim in that case was moot. Although Petitioners now request this Court to review a state court judgment instead of a federal court decision, the Petitioners nevertheless lack Article III standing to pursue this appeal without the participation of the State Defendants.

This Court has previously decided that proponents of a state initiative lacked standing to appeal a finding that an initiative was unconstitutional. *See Don't Bankrupt Washington Committee v. Continental Illinois Nat. Bank & Trust Co. of Chicago,* 460 U.S. 1077 (1983). The Court's summary disposition apparently was triggered by the United States Solicitor General's argument that "where the State has litigated the validity of its law and decided to acquiesce in a holding that it is unconstitutional, it is not the prerogative of private citizens to revive the law through further litigation, even if they might benefit in an abstract way by doing so." Brief of Appellee the United States of America to Dismiss or Affirm, *Don't Bankrupt Washington Committee v. Continental Ill. Nat. Bank and Trust Co.,* 460 U.S. 1077 (1983) (No. 82-1445). The advocacy group in that case – a self-proclaimed citizens' group that drafted and campaigned for the initiative – is identically situated to Petitioner AOE.

This appeal is also precluded by *Diamond v. Charles,* 476 U.S. 54 (1986), where the Court held that a private party did not have standing to pursue an appeal without the participation of the state officials against whom the lawsuit had been brought. In *Diamond,* physicians brought suit against Illinois state officials to enjoin a state law governing abortions. A private physician opposed to abortions intervened in district court. After defending the

law in the district court and the court of appeals, the Illinois officials declined to appeal to this Court, but the private physician sought to appeal the judgment. The Court dismissed the appeal for lack of jurisdiction. In holding that the physician had failed to show that he had standing under Article III to appeal the decision, the Court reasoned that "concerns for state autonomy" preclude private individuals from continuing litigation in defense of a state law after the State has decided not to appeal. *Diamond*, 476 U.S. at 65. The court concluded that "only the State has the kind of 'direct stake' identified in *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972), in defending the standards embodied in [a legal] code." *Id.*

Strong practical and institutional considerations support the holding in *Diamond* and the summary disposition in *Don't Bankrupt Washington*.[2] The State is in the best position to decide whether there should be further appellate review of a judgment entered against the State or its officials.

Here, the Arizona Governor and Attorney General decided not to appeal the Arizona Supreme Court decision for a number of compelling reasons. First, because the Arizona Supreme Court construed Article XXVIII very broadly to apply to state elected officials and employees and to all their on-the-job speech, the Attorney General and the Governor were precluded by their

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[2] *See also AOE v. Arizona*, 117 S.Ct. at 1068 ("Nor has this Court ever identified initiative proponents as Article-III-qualified defenders of the measures they advocated.") (citing *Don't Bankrupt Washington*).

consistent position throughout this litigation and the federal litigation from arguing that Article XXVIII is constitutional. In particular, the State Defendants had argued that Article XXVIII should be construed to apply only to official, binding acts of government to avoid constitutional problems that could result from a broad construction.[3] Petitioners agreed that Article XXVIII should be construed to apply only to official, binding governmental acts. AOE's Brief on Petition for Review in the Arizona Supreme Court at 3, 9, 10; *see also AOE*, 117 S.Ct. at 1074 ("At oral argument on December 4, 1996, counsel for petitioners AOE and Park informed the Court that, in petitioners' view, the Attorney General's reading of the Article was 'the correct interpretation.' Tr. of Oral Arg. at 6; *see id.*, at 5 (in response to the Court's inquiry, counsel for petitioners stated: '[W]e agree with the Attorney General's opinion as to [the] construction of Article XXVIII on [constitutional] grounds.' ")). Moreover, this Court is bound by the Arizona Supreme Court's construction of Article XXVIII. *See Johnson v. Fankell*, 117 S.Ct. 1800, 1804 (1997); *Wisconsin v. Mitchell*, 508 U.S. 476, 483, 113 S.Ct. 2194, 2198 (1993). Thus, the Governor and Attorney General reasonably chose not to appeal the Arizona Supreme Court's finding that, as construed broadly, Article XXVIII is unconstitutional.

Second, although the Arizona Supreme Court's failure to address the State's authority to control its own speech and to regulate its employees' speech is troubling,

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[3] Petitioners incorrectly assert that the State argued that Article XXVIII is constitutional notwithstanding its breadth. AOE's Petition at 9 n. 4.

the Governor and the Attorney General reasonably determined that the impact of the decision could be limited to Article XXVIII because of the court's numerous caveats. The court did not address the government's right to choose the content of its speech, *see Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819, 833-34 (1995), or the substantial deference accorded to the State as employer to restrict its employees' on-the-job speech, *see, e.g., Connick v. Myers*, 461 U.S. 138, 147 (1983).[4] To limit the impact of its decision, however, the court "emphasize[d] that nothing in [the] opinion compels any Arizona governmental entity to provide any service in a language other than English." *Ruiz* at ¶ 3. The court also cautioned that it did not "prohibit government offices from adopting language

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[4] Without discussing *Connick v. Myers* and its progeny, the court stated: "Assuming *arguendo* that the government may, under certain circumstances and for appropriate reasons, restrict public employees from using non-English language to communicate while performing their duties, the Amendment's reach is too broad." *Ruiz* at ¶ 45. Later, the court relied on *United States v. National Treasury Employees Union*, 513 U.S. 454, 465-66 (1995) ("*NTEU*"), to support its conclusion that prohibiting an elected or appointed government official or an employee from communication with the public violates the employee's and the official's rights, *Ruiz* at ¶ 51, without discussing this Court's reiteration of the principle that the government may impose "restraints on job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." *NTEU*, 513 U.S. at 465. Nor did the court acknowledge that the ban in *NTEU* concerned public employees' speech outside the workplace, or in any way attempt to fit this case within the framework developed by this Court in *Pickering v. Board of Ed. of Township High School Dist.*, 391 U.S. 563 (1968); *Connick v. Myers*, and *Waters v. Churchill*, 511 U.S. 661 (1994).

rules for appropriate reasons,"[5] but found that Article XXVIII "goes too far because it effectively cuts off governmental communication with thousands of limited-English-proficient and non-English-speaking persons in Arizona, even when the officials and employees have the ability and desire to communicate in a language understandable to them." *Id.* at ¶ 51. And, the court did not find that a language minority constitutes a suspect class for equal protection purposes.[6] *Id.* at n. 12. The court concluded: "Significantly, in finding the amendment unconstitutional, we do not hold, or even suggest, that any governmental entity in Arizona has a constitutional obligation to provide services in languages other than English, except, of course, to the extent required by federal law." *Id.* at ¶ 72. Thus, because of the court's limiting statements, the State Defendants reasonably concluded that the *Ruiz* decision would have limited precedential effect.

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[5] Indeed, the court recognized that there are many English language requirements under federal and Arizona law. For example, the court noted that federal law and the Arizona Constitution require that Arizona schools be conducted in English, *Ruiz* at ¶ 20 (quoting the Arizona-New Mexico Enabling Act of 1910, ch. 310 § 20(4) ("the Enabling Act")), and that all state officers and members of the Legislature be able to read, write, speak, and understand the English language. *Id.* (quoting § 20(5) of chapter 310 of the Enabling Act).

[6] Instead, the court concluded that Article XXVIII curtails First Amendment rights and therefore must survive strict scrutiny. This conclusion is troubling because the court did not need to reach the equal protection argument and because the court did not appropriately limit the breadth of its decision.

Finally, the Governor and the Attorney General reasonably concluded that further litigation concerning the constitutionality of Article XXVIII was not in the State's best interests where the litigation regarding its meaning and constitutionality has spanned more than ten years in six different courts involving nine different published opinions and where both the State and Petitioners have argued that Article XXVIII will not change the operation of state government. Private parties, such as Petitioners, should not be permitted to override the Governor and Attorney General's decision not to appeal the Arizona Supreme Court decision.

B. Petitioners Have Not Suffered Actual Injury.

Although this Court expressed grave doubts about Petitioners' standing in *AOE*, the very same Petitioners apparently believe that they have standing here because this is an appeal from a state court decision, instead of a federal court decision, and because they are bound by the state court decision. *See* Amicus Brief of Washington Legal Foundation, et al. in Support of Petitioners at 11-16. Because Petitioners cannot demonstrate actual injury, however, there is no Article III case or controversy.

In *ASARCO, Inc. v. Kadish*, 490 U.S. 605 (1989), the Court held that the petitioners there had standing to appeal an adverse decision of the Arizona Supreme Court even though the prevailing plaintiffs in the underlying decision would not have had standing to bring the lawsuit in federal court. Central to the Court's decision, however, was its recognition that the petitioners suffered actual injury. In *ASARCO*, individual Arizona taxpayers

and the Arizona Education Association brought suit in Arizona state court seeking a declaration that the state statute governing mineral leases on state lands was void under the Enabling Act. *Id.* at 611. The petitioners, who had intervened in the trial court, held mineral leases that were granted under the state law and invalidated by the Arizona Supreme Court. *Id.* at 618. Thus, the decision that the petitioners requested the Court to review posed a "serious and immediate threat to the continuing validity of [their] leases" and the Court concluded that the petitioners were "faced with 'actual or threatened injury' that [was] sufficiently 'distinct and palpable' to support their standing to invoke the authority of a federal court." *Id.* at 628 (quoting *Warth v. Seldin*, 422 U.S. 490, 500-501 (1975)).

In contrast, Petitioners here are not like the mineral lessees in *ASARCO*. Rather, they are similar to the general taxpayers and the teachers association that the Court in *ASARCO* found would not have had standing to bring suit in federal court. Petitioners are not faced with any actual or threatened injury stemming from the Arizona Supreme Court decision that is any different from that of the general public.

And, although Petitioners are bound by the Arizona Supreme Court decision and therefore precluded from bringing a private enforcement action pursuant to Section 4 of Article XXVIII,[7] they have not suffered Article III injury as a result of the Arizona decision invalidating

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[7] Section 4 of Article XXVIII, entitled "Enforcement; Standing," provides that "[a] person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State."

Article XXVIII.[8] *See AOE*, 117 S.Ct. at 1068 ("Nor do we discern anything flowing from Article XXVIII's citizen suit provision – which authorizes suit to enforce Article XXVIII in state court – that could support standing for Arizona residents in general or AOE in particular to defend the Article's constitutionality in federal court."). This is because Petitioners' injury is no different from that of the general public. This Court has "consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly benefits him than it does the public at large – does not state an Article III case or controversy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992). Moreover, the Court specifically held in *Lujan* that Congress could not "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the [federal] courts" by creating a private right of action to enforce the law. *Id.* at 577.

Like the private right of action in *Lujan*, the private right of enforcement in Section 4 of Article XXVIII does

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[8] Petitioners' expenditure of time and money to promote Article XXVIII does not satisfy the injury requirement under Article III. *See Diamond v. Charles*, 476 U.S. at 70 (petitioner's liability for attorney's fees in the lower court does not confer standing to challenge the abortion law because the liability for fees is a consequence of petitioner's decision to intervene, but could not be traced to the Illinois abortion law). Petitioners' efforts were designed to put Article XXVIII on the ballot and to persuade voters in Arizona to enact it. Those goals were achieved when AOE's proposed initiative was placed on the ballot and then enacted into law by the Arizona voters.

not confer Article III standing on the citizens of Arizona. Section 4 does not identify the injury it seeks to vindicate or relate the injury to the class of persons entitled to bring suit. *See Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment). Moreover, Petitioners have not identified any way in which they would suffer personal harm if Plaintiffs were permitted to speak Spanish while working for the State.[9] Petitioners therefore lack standing and their Petition should be dismissed.

* * *

In sum, this case presents a particularly unsuitable vehicle for resolving the complicated First Amendment issues presented by Petitioners. Instead of accepting for review the first and most extreme (as interpreted by the Arizona Supreme Court) official English provision, the Court would do better to deny certiorari now and allow

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[9] Amici's contention that Petitioners have standing because the Ninth Circuit recognized in *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991), that they had expressed "their intention to see Article XXVIII enforced against Yniguez," Amici Brief of Washington Legal Foundation at 15 (quoting *Yniguez v. Arizona*, 939 F.2d 727, 734 (1991)), is wrong for two reasons. First, even if there was a legitimate basis in the *Yniguez* record for concluding that Petitioners intended to enforce Article XXVIII against Yniguez, the record in this case is otherwise. Pursuant to Petitioners' interpretation of Article XXVIII, Plaintiffs' use of Spanish would not be prohibited. *See* Petitioners' Brief on Petition for Review at 3, 9, and 10 and Petitioners' Responsive Brief in the Arizona Court of Appeals at 1, 7, 15, 18, 20. Second, even if Petitioners had threatened enforcement, they suffered no particularized injury that would support Article III standing under *Lujan*.

additional, narrower versions of these laws to go into effect and be reviewed by lower courts. If Petitioners are correct that there is a sweeping grass-roots movement in favor of official English laws, then the issue certainly will return to this Court.[10] Moreover, it plainly would be more appropriate to resolve the constitutional issues presented here where the State is affirmatively defending its own law.

By deferring resolution of the issue, the Court can 1) allow the constitutional question to ripen by permitting additional courts to analyze the issues and thereby obtain the benefit of their insights; 2) have the benefit of seeing different permutations of official English laws to assist in deciding where best to draw any constitutional lines; and 3) avoid having to resolve the thorny Article III standing issue that poses a substantial obstacle to review of the First Amendment issues presented here, and thereby avoid the waste of scarce judicial resources resolving a procedural issue that plainly does not warrant review by this Court. There simply is no crying need for the Court to decide the questions presented at this time. The more prudent course is to allow Arizona's limited precedent to

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[10] Petitioners argue that the decision of the Arizona Supreme Court will distort the political debate by introducing constitutional questions into the political process. Petition at 26-27. But constitutional questions are inherent in the English-only concept. Even if this Court were to hold that the federal Constitution imposes absolutely no restraints on what a State can do in this area (a highly doubtful proposition), state constitutional issues will continue to influence the political discourse. Thus, premature review may undermine the quality of this Court's deliberations on these issues without providing any substantial, corresponding benefit to the political process.

stand and await a better case in which to resolve the difficult constitutional problems posed by English-only requirements.

CONCLUSION

This Court should deny the Petition for a writ of certiorari.

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November 16, 1998

Supreme Court, U.S.
FILED
NOV 23 1998
CLERK

(3)

No. 98-167

In The

Supreme Court of the United States

October Term, 1998

ARIZONANS FOR OFFICIAL ENGLISH AND ROBERT D. PARK,

Petitioners,

v.

STATE OF ARIZONA; JANE DEE HULL, Governor of Arizona; GRANT WOODS, Attorney General of Arizona; LINDA AGUIRRE; JOHN PHILLIP EVANS; ROSIE GARCIA; JOE EDDIE LOPEZ; CANDIDO MERCADO; PETER RIOS, JR.; ARMANDO RUIZ; MACARIO SALDATE IV; FEDERICO SANCHEZ; and VICTOR SOLTERO,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arizona

BRIEF IN OPPOSITION OF RESPONDENTS AGUIRRE, EVANS, GARCIA, LOPEZ, MERCADO, RIOS, RUIZ, SALDATE, SANCHEZ AND SOLTERO

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QUESTION PRESENTED

1. Does a state law proscribing all state elected officials and state employees from communicating with their constituents and members of the public in languages other than English "during the performance of government business" violate the First and Fourteenth Amendments?

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Bartels v. Iowa, 262 U.S. 404 (1923) 24

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Meyer v. Nebraska, 262 U.S. 390 (1923) 24, 25

Nebraska District of Evangelical Lutheran Synod v. McKelvie, 262 U.S. 410 (1923) 24

New York Times v. Sullivan, 376 U.S. 254 (1964) 4, 6, 21, 28

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Schaefer v. United States, 251 U.S. 466 (1920) ..21, 22, 23

Slaughter-House Cases, 83 U.S. (16 Wall. 36) (1873) 17

Wisconsin v. Mitchell, 508 U.S. 476 (1993) 4

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Yniguez v. Mofford, 730 F.Supp. 309 (D. Ariz. 1990) 5

Yniguez v. Arizonans for Official English, 42 F.3d 1217 (9th Cir. 1994) 5

Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) 5

Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926) 24

CONSTITUTIONAL AUTHORITIES

Arizona State Constitution, Article XXVIII ..... *passim*

United States Constitution, First Amendment .... *passim*

United States Constitution, Fourteenth Amendment ..... *passim*

STATUTUE

Arizona Revised Statute § 12-1831 2

OTHER AUTHORITIES

W.P. Adams, "The Colonial German-Language Press and the American Revolution," *The Press and the American Revolution* (B. Bailyn & J. Hench eds. 1980) 9

J. Adams, *Thoughts on Government* (1776) 27

J. Allen, *Printers and Press Freedom* (1988) 8

A. Amar, *The Bill of Rights* (1998) 6, 17, 19, 28

M. Arrington, Note, *English Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights*, 7 J.L. & Pol. 325 (1991) 1

TABLE OF AUTHORITIES – Continued

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B. Bailyn, *Voyagers to the West* (1986)..... 6, 7, 8

B. Bailyn, *The Ideological Origins of the American Revolution* (1967)..... 27

B. Bailyn, *The Peopling of British North America* (1986)..... 10

K. Bartel, *German and Germans at the Time of the American Revolution*, 60 Modern Language Journal 98 (1976)..... 8

D. Baron, *The English-Only Question* (1991)..... 1

M. Blanchard, *Revolutionary Sparks* (1992)..... 23

L. Bollinger, *The Tolerant Society* (1986)..... 24

C. Calloway, *The American Revolution in Indian Country* (1995)..... 7

Z. Chafee, *Free Speech in the United States* (1941)..... 23, 24, 26

Congressional Globe (1866)..... 16, 17, 19

K. Conzen, "Germans," *Harvard Encyclopedia of American Ethnic Groups* (1980)..... 8

J. Crawford, *Hold Your Tongue*..... 1, 14

M. Curtis, *No State Shall Abridge* (1986)..... 18

The Debate on the Constitution (B. Bailyn ed. 1993)..... 12

D. Donald, *Liberty and Union* (1978)..... 14

D. Donald, *The Politics of Reconstruction, 1863-1867* (1965)..... 15

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D. Donald, *Lincoln* (1995) 13, 14

Elliot's Debates on the Adoption of the Federal Constitution (1845) 26

A. Faust, *The German Element in the United States* (1927) 14

E. Foner, *Reconstruction* (1988) 15

E. Foner, *Free Soil, Free Labor, Free Men* (1995) 14

J. Franklin, *The Emancipation Proclamation* (1963) 17

W. Freehling, *The Road to Disunion* (1990) 17

N. Grado, "The Cultural Effects of the Revolution," *The Blackwell Encyclopedia of the American Revolution* (1994) 6

S. Heath, "Language and Politics in the United States," *Linguistics and Anthropology* (1977) 11

S. Heath, "A National Language Academy? Debate in the New Nation," Inter. Nat. Jour. Socio. Lang. (1976) 12

A. Josephy, *The Indian Heritage of America* (1968) 7

Journal of the Proceedings of the Convention of Louisiana (1845) 15

H. Kloss, *The American Bilingual Tradition* (1977) 6

L. Levy, *Emergence of a Free Press* (1985) 8, 26

A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1960) 26, 28

R. Middlekauff, *Benjamin Franklin and His Enemies* (1996) 10

E. Morgan, *Inventing the People* (1988) 27

TABLE OF AUTHORITIES – Continued

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R. Morris, *Witnesses at the Creation* (1985) 6

W. Nelson, *The Fourteenth Amendment* (B. Bailyn & J. Hench eds. 1980)..... 15

The Papers of Benjamin Franklin (1753) 10

W. Parson, "Representation of Ethnicity Among Colonial Pennsylvania Germans," *A Mixed Race; Ethnicity in Early America* (F. Shuffelton ed. 1993)..... 10

J. Perea, "Demography and Distrust: An Essay on American Languages, Cultural Pluralism and Official English," 77 Minn. L. Rev. 269 (1992)..... 9

J. Rakove, *Original Meanings* (1996)..... 27

K. Stamp, *America in 1857* (1990)..... 14

J. Story, *Commentaries on the Constitution of the United States* (1833)..... 11

M. Urofsky, "The Brandeis-Frankfurter Conversations," 1985 Sup. Ct. Rev. 299..... 24

S. Wolf, *As Various as Their Land: The Everyday Lives of Eighteenth-Century Americans* (1993)..... 8

INTRODUCTION

Pursuant to this Court's request that respondents respond to the Petition for Certiorari filed by Arizonans for Official English and Robert D. Park, respondents Aguirre, Evans, Garcia, Lopez, Mercado, Rios, Ruiz, Saldate, Sanchez, and Soltero respectfully request that the Petition be denied for the reasons set forth below.

REASONS FOR DENYING THE PETITION

Summary of Argument

Article 28 of the Arizona Constitution provides that "English is the language of the ballot, the public schools and *all* governmental functions *and* actions." Ariz. Const., Art. 28, § 1(2) (emphasis added). Article 28 applies to "the legislative, executive and judicial branches of government," and to "*all* political subdivisions, departments, agencies, organizations, instrumentalities, local governments and municipalities" of Arizona, including "*all* government officials and employees during the performance of government business." *Id.*, 1(3)(a)(iv) (emphasis added). Article 28 requires that "[t]his State and all political subdivisions of this State shall act in English and in no other language," and "prohibit[s] [t]his State from using or requiring the use of languages other than English. . . . " *Id.*, § 3(1)(a) (emphasis added). Based on this uniformly broad language, Article 28 is "by far the most restrictively worded official-English law to date." M. Arrington, Note, *English Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights*, 7 J.L. & Pol., 325, 327 (1991).[1]

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[1] *See also* D. Baron, *The English-Only Question* 21 ("[A]rticle 28 . . . is the most restrictive of the current wave of official-language laws. . . . ") (1990), and J. Crawford, *Hold Your Tongue* 176 (1992) ("Arizona's [Article 28 is] so far the most restrictive [Official English] measure").

Respondents are a group of Hispanic state elected officials and state employees who routinely communicate in Spanish with their constituents and members of the public "during the performance of government business." Respondents thus fall within the express prohibitions of Article 28. Many of respondents' constituents do not speak English well or at all. Article 28 would consequently prevent respondents from providing information to constituents and other members of the public that they are elected and employed to serve.

After the Governor of Arizona announced her intention to enforce Article 28, respondents challenged the constitutionality of Article 28 in the Maricopa County Superior Court seeking a declaration that Article 28 violated their rights under the free speech clause of the First Amendment and the equal protection clause of the Fourteenth Amendment.[2] Arizonans for Official English and its Chairperson Robert D. Park subsequently intervened as defendants in the litigation. In an unpublished memorandum decision, the Maricopa County Superior Court entered summary judgment in favor of the defendants. Respondents appealed the judgment to the Arizona Court of Appeals, and that court unanimously reversed the Superior Court. The defendants then appealed from the Court of Appeals judgment to the Arizona Supreme Court. In a unanimous decision, the Arizona Supreme Court affirmed judgment of the Court of Appeals and concluded that Article 28 violated the First and Fourteenth Amendments.

The State of Arizona, the Governor of Arizona, and the Attorney General of Arizona elected not to appeal from the Arizona Supreme Court's judgment. However,

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[2] Respondents sued the State of Arizona, the Governor of Arizona, and the Attorney General of Arizona under 42 U.S.C. § 1983 and the Arizona Declaratory Judgment Act, A.R.S. § 12-1831.

the intervening defendants – Arizonans for Official English and Robert D. Park – timely filed a Petition for a Writ of Certiorari to the Supreme Court of Arizona.[3]

Because Article 28 expressly forbids state elected officials (and their agents) from communicating with their constituents and members of the public in languages other than English "during the performance of government business," the Arizona Supreme Court concluded that Article 28 abridged "core" political speech in violation of the free speech clause of the First Amendment. Specifically, the Arizona Supreme Court reasoned that:

> [Article 28] violates the First Amendment by depriving elected officials and public employees of the ability to communicate with their constituents and with the public. With only a few exceptions, the Amendment prohibits all public officials and employees in Arizona from acting in a language other than English while performing government functions and policies. We do not prohibit government offices from adopting language rules for appropriate reasons. We hold that the Amendment goes too far because it effectively cuts off governmental communication with thousands of limited-English-proficient and non-English-speaking persons in Arizona, even when the officials and employees have the ability and desire to communicate in a language understandable to them. Meaningful communications in those cases is barred. Under such circumstances, prohibiting an elected or

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[3] Respondents agree with the State Respondents that petitioners lack standing to appeal the Arizona Supreme Court's judgement regarding Article 28 because petitioners' lack a *federally* cognizable interest in Article 28. *See generally State Respondents' Brief in Opposition to Petition for Writ of Certiorari* 6-12 (Nov. 16, 1998).

> appointed official or an employee from communicating with the public violates the employee's and the official's rights.

Ruiz v. Hull, 957 P.2d 984 (Ariz. 1998), *Petitioners' Appendix* 32a.[4] The Arizona Supreme Court also concluded that Article 28 violated the equal protection clause of the Fourteenth Amendment, reasoning that:

> By permanently implementing a linguistic barrier between persons and the government they have a right to petition, [Article 28] substantially burdens First Amendment rights. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961) ("The whole concept of representation depends upon the ability of the people to make their wishes known to their representatives"). Therefore, [Article 28] violates the Fourteenth Amendment's guarantees of equal protection because it impinges upon both the right to participate equally in the political process and the right to petition the government for redress.

Id. at 41a-42a. These conclusions reflect this Court's well-settled understanding of the First and Fourteenth Amendments. As this Court recognized in *New York Times v. Sullivan*, 376 U.S. 254, 266 (1963), the First Amendment was designed to "secure the widest possible dissemination of information from diverse and antagonistic sources." Article 28 threatened to circumscribe the dissemination of information by restricting the political speech of state elected officials. Moreover, because Article 28 would restrict the free speech rights of a specific class

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[4] Although both the State defendants and petitioners contested the construction of Article 28 ultimately adopted by the Arizona Supreme Court and contended that the scope of Article 28 was extremely narrow, this Court is bound by the Arizona Supreme Court's construction of Article 28. *See, e.g., Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993).

of speakers, it violates the equal protection principles applied by this Court in *Romer v. Evans*, 116 S.Ct. 1620 (1996).[5]

The Arizona Supreme Court was consequently correct in declaring Article 28 unconstitutional.[6] There is consequently no reason for this Court to consume its scarce resources on this dispute by means of granting certiorari.

A. Polylingualism and the Framers.

As this Court observed over one hundred years ago, [t]he Constitution of the United States . . . was made . . . for a people gathered and to be gathered from many nations and of *many tongues*. *Hurtado v. California*, 110 U.S. 516, 530-531 (1884) (emphasis added). Reflecting the enduring validity of this observation, the public and private uses of languages other than English have been a staple of every era of American history. Although English has always enjoyed linguistic primacy in the United

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[5] The Arizona Supreme Court carefully limited the scope of its opinion: "In making these rulings, we express no opinion concerning the constitutional validity of less restrictive English-only provisions discussed in this opinion. We also emphasize that nothing in this opinion compels any Arizona governmental entity to provide service in a language other than English." *Petitioners' Appendix* 7a.

[6] In addition to the Arizona Court of Appeals and the Arizona Supreme Court, three federal tribunals have declared Article 28 void as violative of the First Amendment: the United States District Court in *Yniguez v. Mofford*, 730 F. Supp. 309 (D. Ariz. 1990), a three judge panel of the Ninth Circuit in *Yniguez v. Arizonans for Official English*, 42 F.3d 1217 (9th Cir. 1994), and the Ninth Circuit sitting en banc in *Yniguez v. Arizonans for Official English*, 69 F.3d 920, *vacated on remand*, 118 F.3d 667 (9th Cir. 1997). Accordingly, petitioners have lost this case on five separate occasions.

States, this primacy has peacefully coexisted with extensive polylingualism in the private and the public spheres of American discourse. The American tradition of linguistic tolerance has both shaped and is a product of the principle of "the freedom of speech" guaranteed by the First Amendment.[7]

The polylingualism of the founding era is well-documented. *See generally* H. Kloss, *The American Bilingual Tradition* (1977). As Professor Norman Grado writes:

> The sounds of Africa, Europe, the Mediterranean, and the West Indies enriched the coastal air [of eighteenth-century America] as much as did the spices and aromas of various ethnic cuisines. . . . We tend to forget that passionate conversations about religion and politics, as well as family matters, were as likely to be thought through and spoken in vigorous German, French, Dutch, Yoruba, Gullah, Spanish, Swedish or Farsi. . . .

Norman S. Grado, "The Cultural Effects of the Revolution," in *The Blackwell Encyclopedia of the American Revolution* 579 (1994). Similarly, many Scottish, Welsh and Irish immigrants in Revolutionary America spoke Gaelic (and dialects thereof) and were unable to communicate in English. *See* B. Bailyn, *Voyagers to the West* 575-576 n.2 (1986), and R. Morris, *Witnesses at the Creation* 121 (1985). Georgia, New York, Maryland, Pennsylvania, Virginia, North Carolina, South Carolina, Florida, Alabama (then called "West Florida"), and Louisiana all had significant

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[7] When interpreting the First Amendment, this Court frequently considers the free speech traditions of the era when the Bill of Rights was drafted and ratified. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 273-277 (1964). As Professor Akhil Amar has demonstrated, the free speech traditions of the era in which the Fourteenth Amendment was drafted and ratified also inform First Amendment interpretation. *See* A. Amar, *The Bill of Rights* 137-294 (1998).

polylingual communities during the Revolutionary era, speaking Dutch, French, German, Gaelic, Greek, Italian, and Spanish. *See* B. Bailyn, *Voyagers to the West* 19, 25, 27, 455-461, 467, 478, 575-576 (1986).

In addition to languages native to Europe and the British Isles, over one thousand Native American languages were spoken in eighteenth-century America. *See* A. Josephy, *The Indian Heritage of America* 12-15 (1968). For example,

> [while t]raveling in New York in 1776, Joseph Bloomfield, then a captain in the Third New Jersey Regiment and later governor of New Jersey, heard spoken on a daily basis English, High Dutch, Low Dutch, French, Mohawk, Oneida, Seneca, Cayuga, Onondaga, and Tuscarora.

C. Calloway, *The American Revolution in Indian Country* 17 (1995). The prevalence of these indigenous tongues had a significant impact on the European settlers of early America; indigenous languages were so pervasive during the Revolutionary era that the European settlers "incorporated Algonkian, Iroquoian, and Muskhogean terms into their vocabulary." *Id.* Thus, like many other states, the Commonwealth Massachusetts is named after a Native American tribe.

African-Americans – who comprised approximately one fifth of the population of Revolutionary America – also spoke various African-related dialects. As Stephanie Grauman Wolf observes:

> The many languages of Africa were integrated with each other [in eighteenth-century America], as well as with English, to form the Creole languages distinctive in different parts of the southern colonies. We are familiar with the Gullah tongue of the islands of the eastern coast of South Carolina because it has survived into the twentieth century, but many contemporaries noticed Virginia blacks spoke a special "mixed dialect between Guinea and English," while a

> missionary in 1748 reported that blacks in the Chesapeake had "a language peculiar to themselves, a wild confused medley of Negro and corrupt English, which makes them very unintelligible except to those who have conversed with them for many years."

S. Wolf, *As Various as Their Land: The Everyday Lives of Eighteenth-Century Americans* 264 (1993).

Foreign language speech was not limited to the spoken word, and the foreign language press was active throughout the Revolutionary era. Benjamin Franklin published the first German language newspaper in America in 1732 – the *"Philadelphische Zeitung," see* K. Bartel, "German and the Germans at the Time of the American Revolution," 60 *Modern Language Journal* 98 (1976), and one of the most significant newspapers published during the Revolutionary era was the *"Wochentliche Pennslyvanische Staatsbote." See* B. Bailyn, *Voyagers To The West*, 62, 310, 402 (1986). Approximately thirty-eight different German-language newspapers were published in America between 1732 and 1800. *See* K. Conzen, "Germans," *Harvard Encyclopedia of American Ethnic Groups* 409 (1980). In fact, a father of the American free press – John Peter Zenger – was a "poorly educated German immigrant" who probably spoke more German than English, *see* L. Levy, *Emergence of a Free Press* 39, 52 (1985), and one of the first significant controversies in America regarding freedom of the press and the law of seditious libel involved a 1758 edition of the *Philadelphische Zeitung*. *See* J. Allen, *Printers and Press Freedom* 132-134 (1988).

Indeed, newspapers like *Der Philadelphishce Staatsbote* and the *Wochentliche Pennslyvanische Staatsbote* contributed to the public dialogue that culminated in the American Revolution and helped to establish the national identity essential to the Revolution's success. Professor W.P. Adams notes that:

> The German-language press played a major role in the political culture that sustained the transformation of colonial territories and provincial societies into an independent American nation-state. It helped create an enlightened, politically relevant public opinion that gave practical meaning to the central principles of enlightened politics, popular sovereignty and the accountability of the rulers to their electors. In doing so it also played an active role in the process of nation-building. It helped the German-speaking minority to feel part of and to function in a larger national whole. And it did all of this in ways that were not much different from the ways by which the English-language press all over the colonies helped integrate their diverse audiences into a national community.

W.P. Adams, "The Colonial German-language Press and the American Revolution," in *The Press and the American Revolution* 219 (B. Bailyn & J. Hench eds.) (1980). This conclusion is perhaps best illustrated by the fact that the *first* American newspaper to announce the promulgation of the Declaration of Independence was *Der Philadelphishce Staatsbote*. *Id.* at 152.

Government communications in the Revolutionary era reflected the linguistic diversity of the period. In the public sphere at the national level, the Continental Congress published various official documents in English, German, and French editions, including the Articles of Confederation and the famous 1774 Address to the people of Quebec lauding the relationship between a free press and self-government. *See generally*, J. Perea, "Demography and Distrust: An Essay on American Languages, Cultural Pluralism and Official English," 77 Minn. L. Rev. 269, 284-287 (1992). The Continental Congress also issued numerous other documents in German and French in connection with its successful efforts to recruit German and French troops. *Id.*

Official polylingualism was also common at the local level. "An estimated 10 percent of the pre-Revolutionary population was German-speaking, . . . [and Georgia's] population was so polyglot that a successful magistrate needed to speak fluently in at least three languages and preferably four. . . . " B. Bailyn, *The Peopling of British North America* 16-17 (1986). In eighteenth-century Pennsylvania, "[i]n legal action[s] and court proceedings . . . , documents in German were just as valid as those in English." W. Parsons, "Representation of Ethnicity Among Colonial Pennsylvania Germans," in *A Mixed Race: Ethnicity in Early America* 120 (F. Shuffelton ed. 1993). Under the leadership of Benjamin Franklin, petitions in German and English were distributed to be signed by the electorate and submitted by the Pennsylvania Assembly to the British Parliament requesting that the Penn proprietorship be abolished and replaced with a royal charter. *See* R. Middlekauff, *Benjamin Franklin and His Enemies* 87, 98-99 (1996).

Based on the unqualified language of the free speech clause and the pervasive private and official use of foreign language speech throughout the Revolutionary era, the framers of the First Amendment obviously believed that foreign language speech constituted "speech" for First Amendment purposes. Although the framers were acutely aware of the existence of foreign language speech in the public sphere – Franklin publicly lamented it[8] – they did nothing to suggest that such speech could be lawfully abridged; to the contrary, the framers associated language proscriptions with the European oppression that the American Revolution sought to vanquish. As

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[8] Franklin's remarks about "the Palatine Boors . . . swarm[ing] into our settlements, and by herding together establish[ing] their language and manners to the exclusion of ours" are well-known. *See* 4 *The Papers of Benjamin Franklin* 227 (1751) (Labaree ed. 1961).

Justice Joseph Story explained in his *Commentaries on the Constitution,*

> The next clause of the amendment respects the liberty of the press. "Congress shall make no law abridging the freedom of speech, or of the press. . . . " A little attention to the history of other countries in other ages will teach us the vast importance of this right. It is notorious, that even to this day, in some foreign countries it is a crime to speak upon any subject, religious, philosophical, or political, what is contrary to the received opinions of the government, or the institutions of the country, however laudable may be the design, and however virtuous may be the motive. . . . The Bible itself, the common inheritance, not merely of Christendom, but of the world, has been put exclusively under the control of government; and not allowed to be seen, or heard, except in a language unknown to the common inhabitants of the country. To publish a translation in the vernacular tongue, has been in former times a flagrant offense.

J. Story, *Commentaries on the Constitution of the United States* 703-705 (1833). Similarly, a leading scholar in the history of American multilingualism, Professor Shirley Heath, has noted that:

> [E]arly political leaders recognized the close connection between language and religious/cultural freedoms, and they preferred to refrain from proposing legislation which might be construed as a restriction on these freedoms.

S. Heath, "Language and Politics in the United States," in *Linguistics and Anthropology* 267, 270 (1977). These comments reflect the framers' association of language proscriptions with the religious and cultural oppression of Europe. Just as the framers rejected the idea of an established religion or a ministry of culture, they also rejected the idea of an official language and a language academy.

Id. See also S. Heath, "A National Language Academy?" Debate in the New Nation, 11 *International Journal of the Sociology of Language* 9 (1976).

Thus, the absence of language proscriptions is an element of the liberty affirmed and institutionalized by the Constitution. As Tench Coxe observed in 1787 during the debates on the ratification of the Constitution:

> To take a proper view of the ground on which we stand, it may be necessary to recollect the manner in which the United States were originally settled and established. Want of charity in the religious systems of Europe and of justice in their political governments were the principal moving causes which drove the emigrants of various countries to the American continent. The Congregationalists, Quakers, Presbyterians and other British dissenters, the Catholics of England and Ireland, the Huguenots of France, the German Lutherans, Calvinists, and Moravians, with several other societies, established themselves in the different colonies, thereby laying the ground of that catholicism in ecclesiastical affairs which has been observable since the late revolution: Religious liberty naturally promotes corresponding dispositions in matters of government.

1 *The Debate on the Constitution* 20 (B. Bailyn ed. 1993).

Article 28 is a radical repudiation of this foundational free speech tradition.

B. Polylingualism and the Fourteenth Amendment.

The linguistic tolerance of the founding era did not end with the ratification of the Constitution and the Bill of Rights. The American polylingual tradition continued unabated in the nineteenth-century and is richly illustrated by the Civil War and Reconstruction years. A brief examination of this transformative period of constitutional history is useful to appreciate the Fourteenth

Amendment's impact on the free speech rights of minority groups.

In 1855 when asked whether he was in agreement with the nativistic "Know-Nothing" party, Abraham Lincoln answered:

> How could I be? How can anyone who abhors the oppression of negroes, be in favor of degrading classes of white people? Our progress in degeneracy appears to me to be pretty rapid. As a nation, we began by declaring that *"all men are created equal."* We now practically read it, "all men are created equal, *except negroes."* When the Know-Nothings get control, it will read, "all men are created equal, except negroes, and *foreigners and catholics."* [When it comes to this] I should prefer emigrating to some country where they make no pretense of loving liberty – to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocrisy.

D. Donald, *Lincoln* 189 (1995) (emphasis in original). Subsequently, in 1861 when criticizing a proposed amendment to the Massachusetts constitution imposing a two year residency requirement on voting by naturalized citizens, Lincoln explained that:

> I have little notoriety for commiserating the oppressed condition of the negro, and I should be strangely inconsistent if I could favor any project for curtailing the existing rights of white men, even though born in different lands, and *speaking different languages* from myself.

Id. at 231 (emphasis added). Lincoln's opinions regarding equality under law were shared by his Republican colleagues. The Republican platform of 1860 contained an anti-nativist plank opposing "any state legislation by which the rights of citizens hitherto accorded to immigrants from foreign lands shall be abridged or impaired; and in favor of giving a full and efficient protection to the

rights of all classes of citizens, whether native or naturalized. . . . " E. Foner, *Free Soil, Free Labor, Free Men* 257 (1995). Thus, on the eve of the Civil War, the Republicans who would later draft the Fourteenth Amendment identified foreign language speakers as a specific class of individuals entitled to equal rights.

Republican tolerance of linguistic pluralism respected the underlying ethnic diversity of the era. "*Heterogeneous* was the only adjective that could describe the American people [on the eve of the Civil War]. . . . [B]y 1850 the American population included representatives of almost every race and language in the world." D. Donald, *Liberty and Union* 5 (1978) (emphasis in original). Ever cognizant of the importance of the foreign language vote, political candidates in the Civil War era were careful to communicate with these voters in their native tongues. In 1856, presidential candidate James Buchanan had a campaign pamphlet discussing the "free soil" controversy in the Kansas territory translated into German "for circulation in Pennsylvania's German counties." K. Stamp, *America in 1857* 159 (1990). Similarly, in his unsuccessful 1858 senatorial campaign against Stephen Douglas, Abraham Lincoln had his famous "House Divided" speech (among others) translated into German to appeal to Illinois's influential German constituency. *See* D. Donald, *Lincoln* 211, 231 (1995). Carl Schurz and Gustave Koerner also campaigned extensively in German for Lincoln in the 1860 presidential election, and several scholars have argued that German support was essential to Lincoln's success in the election. *See generally* 2 A. Faust, *The German Element in the United States* 150-187 (1927), E. Foner, *Free Soil, Free Labor, Free Men* 259 n. 71 (1995).[9]

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[9] The official polylingualism of this era of constitutional history is also illustrated by the publication of Minnesota's constitution of 1857 in English, German, Swedish, Norwegian and French, *see* J. Crawford, *Hold Your Tongue* 44 (1992),

By 1866, after Appomattox, the ratification of the Thirteenth Amendment, and the passage of the Civil Rights Act of 1866, the principle of linguistic tolerance was orthodoxy for the Republicans who drafted the Fourteenth Amendment. *See generally* E. Foner, *Reconstruction* 257 (1988). For example, Representative Thaddeus Stevens of Pennsylvania – the head of the House delegation to the Joint Committee on Reconstruction that officially reported the Fourteenth Amendment – explained that Reconstruction legislation passed pursuant to section two of the Thirteenth Amendment was designed to assure that "all laws be impartial, *without regard to language*, race or former condition." Quoted in D. Donald, *The Politics of Reconstruction, 1863-1867* 58 (1965) (emphasis added). Representative Stevens later remarked that the Fourteenth Amendment required that "the same laws must and shall apply to every mortal, American, Irishman, African, German, or Turk." Quoted in W. Nelson, *The Fourteenth Amendment* 116 (1988).

In accordance with this conception of equality – and ever mindful of their German-speaking colleagues and constituents – the Reconstruction framers refused to limit the right to vote to those citizens who could read the Constitution and write their names in English. On June 27, 1866, during the first session of the 39th Congress, Senator Lot Morrill of Maine proposed an amendment to a suffrage bill for the District of Columbia requiring English literacy, contending that:

> I believe for the sake of unity, unity in our civilization, unity in our language, unity in our

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California's constitution of 1849 in English and Spanish, Cal. Const. of 1849, and Louisiana's constitution of 1845 in English and French. *See Journal of the Proceedings of the Convention of Louisiana* 313-315 (1845).

> sentiments and opinions, that we ought to inculcate as a standard and a formula that the laws should always be printed in the English language; and so far as any [suffrage] qualification is concerned, certainly our civilization is worth but little in its influence and its effect upon aliens and foreigners, if at least we do not require them to speak our language.

Congressional Globe, 39th Cong., 1st Sess. 3433 (1866). In arguing against Senator Morrill's proposal Senator Samuel Pomeroy of Kansas stated that:

> [T]he man who becomes an American from choice, who looking over the ocean and seeing America, learning of our institutions, breathing somewhat of our freedom, longing to identify himself with us in this great struggle for self-government, comes here and voluntarily assumes the duties of a citizen, enters our Army, and carries our flag to victory; I say such a man, if he cannot write a word in English, is an American; he is a patriot; he is loyal; and he is entitled to vote.

Id. Senator (and future Vice President) Henry Wilson of Massachusetts echoed Pomeroy's views, exclaiming "why tell a German, a man of intelligence and character, that he must read the Constitution in the English language? Why say to the Frenchman, or to any foreigner who comes here, that he must be able to read and write in the English language? I think it is all wrong." *Id.* Based on these remarks, Senator Morrill withdrew his proposed amendment without further debate. *Id.*

Lastly, when considering the meaning of the Fourteenth Amendment, it is important to remember that the institution of slavery acted as a straightjacket on the First Amendment that was not removed until the outbreak of the Civil War and the passage of the Fourteenth Amendment. As Professor Akhil Amar observes:

> From the 1830s on, the abolitionist crusaders had understood that freedom of speech for all men and women went hand in hand with freedom of bodily liberty for slaves. The Slave Power posed a threat to freedom – of all kinds – and could support itself only through suppression of opposition speech, with gag rules on anti-slavery petitions, bans on "incendiary" publications, intrusions on the right of peaceable assembly, and so on.

A. Amar, *The Bill of Rights* 234-235 (1998). *See also* W. Freehling, *The Road to Disunion* 98-118, 289-352 (1990). Slavery's disabling impact on the First Amendment was the subject of frequent petitions by citizens to the 39th Congress. For example, on January 30, 1866, Senator Howard of Michigan presented a petition from "certain German naturalized citizens of the United States residing in Detroit" seeking "prohibition of all restrictions of free speech, free press, free assemblage and free instruction." *Congressional Globe*, 39th Cong., 1st Sess. 494 (1886).[10]

In light of the problem of slavery and free speech, the 39th Congress sought to abolish by means of the Fourteenth Amendment the regulations, practices and customs that stifled free speech. As Justice Bradley acknowledged in his dissenting opinion in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 123 (1873):

> The mischief to be remedied [by the Fourteenth Amendment] was not merely slavery, . . . [but also] that intoleration of free speech and free discussion which often rendered life and property insecure, and led to so much unequal legislation.

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[10] Similarly, one of first petitions received by President Lincoln urging him to immediately abolish slavery was written in German by a group of German-American citizens residing in Chicago. *See* J. Franklin, *The Emancipation Proclamation* 26 (1963).

See also, M. Curtis, *No State Shall Abridge* 32, 49-50, 56, 133-139 (1986).

The framers of the Fourteenth Amendment accomplished their free speech purposes by incorporating an equal protection component into the concept of free speech which prohibited the imposition of state restrictions on speech based on subject matter or group classification. Professor Amar explains that:

> [T]he very meaning of freedom of speech . . . was subtly redefined in the process of being incorporated [into the Fourteenth Amendment]. In the eighteenth century the paradigmatic speaker was someone like John Peter Zenger or James Callender, a relatively popular publisher saying relatively popular things critical of less popular government officials. In the mid-nineteenth century the paradigm shifted to the Unionist, the abolitionist, and the freedman, to speakers like Samuel Hoar, Harriet Beecher Stowe, and Frederick Douglass. . . .
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> The shift from Zenger and Callender to Hoar, Stowe, and Douglass was subtle but significant. All can be seen as "outsiders," but with an important difference. As representatives of the Fourth Estate, Zenger and Callender were outside the government that tried to censor them, but Hoar, Stowe, and Douglass were outsiders in a much deeper sense. Vis-a-vis the Southern society trying to suppress their speech, Hoar, Stowe, and Douglass were geographic, cultural, and ethnic outsiders who were critical of dominant social institutions and opinions. Put this way, this shift directs us away from Madison's first concern in The Federalist No. 51 (the "agency" problem of protecting the people against unrepresentative government), toward his second concern (protecting minorities from "factional" majority tyranny). The new First/

> Fourteenth Amendment tradition is less majoritarian and more libertarian. . . .
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> The 1866 redefinition [of free speech] changed the central purpose . . . of freedom of speech, making central certain types of speech that had previously been far more peripheral: religious speech, artistic speech, and *most importantly, minority speech.*

A. Amar, *The Bill of Rights* 237-238 (1998) (emphasis added). Thus, when seen through the lens of the Fourteenth Amendment, the principle of free speech prohibits the imposition of disparate restrictions on minority speech. As Senator Howard of Michigan stated in his famous speech presenting the final version of the Amendment to the Senate floor, "[the Fourteenth Amendment] abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another." *Congressional Globe*, 39th Cong. 1st Sess. 2766 (1866). *See also Barbier v. Connally*, 113 U.S. 27, 32 (1884) ("Class legislation, discriminating against some and favoring others, is prohibited [under the Fourteenth Amendment]").

The equal protection proscription of "class legislation" was recently illustrated by this Court's opinion in *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996):

> It is not within our constitutional tradition to enact [class-based] laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities. Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one

> group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. The guaranty of equal protection of the laws is a pledge of the protection of equal laws.

(Internal quotation marks and citations omitted.) Like the provision invalidated by this Court in *Romer v. Evans*, Article 28 "identifies persons by a single trait" (foreign language speech) and makes it "more difficult for one group of citizens than for all others to seek aid from the government." *Id.* This regime clearly discriminates based on categories of speakers and thus violates basic equal protection requirements.

In summary, as the Arizona Supreme Court concluded, Article 28 defies the equal protection component of free speech. A class of individuals – foreign language speakers – specifically identified as being within the ambit of Fourteenth Amendment protection by the framers of the Amendment is denied the right to communicate in the manner that its English-speaking counterparts freely enjoy. This is the very type of class-specific legal impediment that the Fourteenth Amendment was designed to abolish.

C. Polylingualism and the Development of Modern Free Speech Jurisprudence.

The American tradition of linguistic tolerance is reflected in the foundations of this Court's free speech jurisprudence. In the case that many scholars identify as the starting point of modern First Amendment law, *Abrams v. United States*, 250 U.S. 616, 620 (1920), the Court considered foreign language speech (Yiddish) and implicitly refused to distinguish between English and foreign language speech for First Amendment purposes. In *Abrams*, several Russian Jewish emigres challenged their convictions under the Espionage Act of 1917 as violative of their free speech rights based on the fact that the only

evidence of "espionage" consisted of the distribution of leaflets in English and Yiddish condemning America's involvement in the Russian Revolution.

Although the Court translated and considered the Yiddish leaflet in *Abrams*, both the majority opinion by Justice Clarke and the dissenting opinion by Justice Holmes treat the two languages as standing on equal footing for First Amendment purposes. Not only does Justice Holmes not suggest that foreign language speech regarding matters of public concern falls outside the scope of First Amendment protection – to the contrary – he concludes that it is virtually inviolate:

> In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had just as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them.

Abrams, 250 U.S. at 629 (1920). Moreover, by equating an individual's right to criticize the government with the government's right to print the laws, Justice Holmes' dissent reflects the theory of popular sovereignty expressly embraced by this Court forty years later in *New York Times v. Sullivan*, 376 U.S. 254, 273-277 (1963).

This Court also considered foreign language speech in the free speech context in *Frohwerk v. United States*, 249 U.S. 616 (1919), and *Schaefer v. United States*, 251 U.S. 466 (1922), both of which involved the question of whether speech published in three German-language newspapers – the *Missouri Staats Zeitung*, the *Philadelphia Tageblatt*, and the *Philadelphia Sonntagsblatt* – violated the Espionage Act of 1918. Although the Court translated the speech in question from German to English in both cases, it did not state or suggest that foreign language speech did not constitute "speech" under the First Amendment. In fact, in his dissenting opinion in *Schaefer*, Justice Brandeis argued that the majority's conclusion that Schaefer's

speech was "seditious" was based on an inaccurate translation of the original German text, which he printed alongside the English version, noting critically that "[e]vidently both the jury and the trial judge failed to examine the German original." 251 U.S. at 487, 488 (1922).[11]

This Court's implicit, but uniform refusal to discriminate against foreign language speech in this important trilogy of free speech cases was not accidental. Discrimination against the German language was both well-known and rampant during the World War I era. As Margaret Blanchard writes:

> In fact, [during the first world war] a whole subculture in American Society was virtually destroyed because of irrational fears. . . . [T]he American people were so frightened of and so enraged at anything German that almost all vestiges of that heritage were systematically eliminated in the United States. Individuals and communities with German sounding names anglicized them in order to avoid community-sponsored retribution. The German language was all but outlawed; German music could no longer be played; and sauerkraut was renamed liberty cabbage. The German-language press, which probably was the strongest of the ethnic presses at the start of the war, suffered terribly. No German newspaper was suppressed during the war, but several did lose second-class mailing privileges, or, in a few cases, all access to the

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[11] Justice Brandeis' use of German in his dissent would have violated Article 28, which expressly applies to the judiciary and requires that all government "orders" be in English and "in no other language." Ariz. Const. Art. XXVIII, §§ 1(3) and 3(1)(a).

> mail. Most of them lost subscribers and advertisers and were as permanently crippled as the community they had served.

M. Blanchard, *Revolutionary Sparks* 91 (1992). The pattern of discrimination against foreign language speech during the World War I era underscores the importance of the Court's failure to subject it to reduced protection in *Abrams*, *Frohwerk*, and *Schaefer*.

The First Amendment implications of proscriptions of foreign language speech during the World War I era were not ignored by the scholarly community. In his classic examination of free speech, *Free Speech in the United States*, Professor Zechariah Chafee rejects any distinction between English and other languages for First Amendment purposes and notes that:

> Even if it can be said the Blackstonian test [regarding prior restraints] does not forbid the government to control its own machinery, [for example,] the post-office, it is clear to every newspaper [advocating violent revolution] that its exclusion from the mails is equivalent to an absolute censorship. The same considerations apply to a censorship of the foreign language press. . . .

Z. Chafee, *Free Speech in the United States* 169 (1941). In concluding that any problems arising from foreign language speech should be resolved non-coercively, Professor Chafee argued:

> Just as the merits of free trade in goods are lessened if the normal processes of competition are checked by monopolies and dumping, so free trade in ideas requires that the barriers to the interchange of argument presented by illiteracy and foreign languages shall somehow be broken down. Aliens cannot be forced to love this country. They will love it rather because it does not employ force except against obviously wrongful overt acts. They will love it as the

> home of wise tolerance, of confidence in its own strength and freedom.

Id. at 240. These remarks reflect the principle of tolerance which predicates free speech jurisprudence. *See generally*, L. Bollinger, *The Tolerant Society* (1986). As this Court acknowledged in *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923):

> That the State may do much, go very far indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages, as well as to those born with English on their tongue. Perhaps it would be highly advantageous if all had a ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution – a desirable end cannot be promoted by prohibited means.

See also Bartels v. Iowa, 262 U.S. 404 (1923), *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 262 U.S. 404, 410 (1923), *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926), and *Farrington v. Tokushige*, 273 U.S. 284 (1927) (all invalidating foreign language proscriptions as unconstitutional).[12]

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[12] Although *Meyer* and its progeny were decided under the due process and equal protection clauses of the Fourteenth Amendment, the decisions have important free speech implications. Justice Brandeis – who joined the majority opinion in *Meyer* without separate comment – later indicated to Felix Frankfurter that he based his decision on the "right to . . . utter speech." M. Urofsky, "The Brandeis-Frankfurter Conversations," 1985 Sup. Ct. Rev. 299, 320. Professor Chafee also analyzed *Meyer* under the rubric of free speech. *See* Z. Chafee, *Free Speech in the United States* 552 (1941). This Court has also characterized *Meyer* as a First Amendment case. *See Griswold v. Connecticut*, 381 U.S. 475, 482 (1965).

Whether considered under the First or Fourteenth Amendments, *Meyer* and its progeny collectively teach that language proscriptions suppress free speech. As this Court observed in a substantively similar context:

> We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expressing of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results.

Cohen v. California, 403 U.S. 15, 24 (1971). If the state cannot lawfully proscribe the display of profanity in the courthouse, *a fortiori* it cannot prohibit the non-disruptive use of foreign languages in the statehouse. Elected officials must maintain the right to communicate with the public by means of the most effective tools available.

D. "Government Speech" and the Free Speech Rights of Elected Officials.

The free speech rights of elected officials are fundamental to representative government under the Constitution. These rights predated the free speech rights of members of the public at large in Anglo-American jurisprudence and served as the conceptual model for the public right of "the freedom of speech" guaranteed by the First Amendment. As Leonard Levy explains:

> The phrase "freedom of speech" originated in Anglo-American history during the struggle of Parliament to achieve the privilege of free debate. . . . Until the last quarter of the eighteenth century, freedom of speech referred not to a civil right but primarily to a parliamentary

> right: the legislator's immunity from punishment for anything said by him in his official capacity during a legislative session.

L. Levy, *The Emergence of a Free Press* 3 (1983). *See also* Z. Chafee, *Free Speech in the United States* 552 (1941) ("The earliest form of freedom of speech secured by the English Parliament was the immunity of its members from responsibility to the King or in the courts for what they said in debates").

The American Revolution transformed the parliamentary privilege into "the freedom of speech" recognized by the First Amendment. *See generally* L. Levy, *The Emergence of a Free Press* 309-322 (1985). The framers of the Constitution believed that the legitimacy of government rested on the "consent of the governed." As James Madison observed when arguing the unconstitutionality of the Alien and Sedition Acts, under the Constitution "[t]he people, not the government, possess absolute sovereignty." 4 *Elliot's Debates on the Adoption of the Federal Constitution* 569-570 (1845). Thus, although historically "the freedom of speech" derived from and reflected the free speech rights of elected officials, this pattern was reversed by the American theory of popular sovereignty under which the free speech rights of elected officials derive from and reflect the free speech rights of the people at large. *See* A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 36 (1960).

When the people elected representatives to accomplish their collective purposes in government, the speech and debate of those representatives were to reflect the speech and debate of the people whom they represented. Jack Rakove observes that:

> If one maxim reflected Americans' ideas of representation . . . it was the belief that a representative assembly "should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them."

J. Rakove, *Original Meanings* 203 (1996), quoting J. Adams, *Thoughts on Government* (1776). This definition of representation enjoyed a consensus at the Constitutional Convention. James Wilson declared that "[t]he Legislature ought to be the most exact transcript of the whole society." *Id.* George Mason proceeded to give what Edmund Morgan describes as "the standard American meaning of representation":

> The requisites in actual representation are that the Representatives should sympathize with their constituents; should think, as they think and feel as they feel . . . so much so, that even the diseases of the people should be represented – if not, how are they to be cured?

Quoted in E. Morgan, *Inventing the People* 272 (1988). This theory of representation provided the "consent" that defined republican government under the Constitution. As Professor Bailyn explains:

> Where government was such an accurate mirror of the people, sensitively reflecting their desires and feelings, consent was a continuous, everyday process. In effect the people were present through their representatives, and were themselves, step by step and point by point, acting in the conduct of public affairs. No longer merely an ultimate check on government, they were in some sense the government. Government had no separate existence apart from them; it was by the people as well as for the people; it gained its authority from their continuous consent.

B. Bailyn, *The Ideological Origins of the American Revolution* 173 (1967). Of course, this theory of consensual representation was contingent upon the ability of the elected to freely converse with their electors, in English or any other tongue.

Although the principle of freedom of speech inhered in the original constitutional structure based on the doctrine of popular sovereignty, it found its richest textual

expression in the First Amendment. The Amendment "sounds in structure and focuses . . . on the representational linkage between Congress and its constituents." A. Amar, *The Bill of Rights* 20 (1998). The Amendment (among other things) protects the deliberative process attendant to representative democracy. *See generally* A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1960). As this Court stated in *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964):

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes by the people. The maintenance of the opportunity for free political discussion to the end that government be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. . . . The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selections. To many this is, and always will be, folly; but we have staked upon it our all."

(Citations and internal quotation marks omitted.)

The application of these free speech principles to elected officials is illustrated by this Court's unanimous opinion in *Bond v. Floyd*, 385 U.S. 116 (1966). In *Bond* the Court considered a First Amendment challenge to the Georgia House of Representatives' refusal to seat Julian Bond upon his lawful election to office based on his public criticism of the Vietnam War. In invalidating the Georgia House's exclusion of Mr. Bond, the Court stated

that the First Amendment requires that elected officials "be given the *widest* latitude to express their views of policy" and that elected officials were entitled to as much protection under the First Amendment as members of the public at large. *Id.* at 136 (emphasis added.) This "wide latitude" necessarily includes the right of elected officials to choose the language by which to communicate with their constituents. This is especially true when some of those constituents are unable to communicate effectively in English.

Bond v. Floyd also illustrates the error of petitioners' contention that Article 28 is justified by "[t]he government's rights to control its own speech." *Petition* 15. This contention is erroneous because it is based on a false assumption that "the government" established by the Constitution is monolithic. In fact, based on the separation of powers, federalism, and multi-member legislatures, government is intentionally fragmented under our constitutional system. Thus, as *Bond v. Floyd* illustrates, the "government" cannot violate the free speech rights of any constituent part of government.

Accordingly, petitioners' assertions regarding government speech are predicated on a theory of sovereignty that is antithetical to the American Constitutional tradition.

E. This case does not involve circumstances worthy of certiorari.

The resolution of this case was contingent on a uniquely restrictive state enactment which was authoritatively construed by the State's highest tribunal and which the State itself has elected not to defend. Although this case is important to the parties to this proceeding, the Arizona Supreme Court's judgment resolving the case does not establish rules of general applicability to our nation's legal system. Instead, the Arizona Supreme Court's decision reflects six years of painstaking efforts

by a state court system to apply well-settled constitutional principles to a peculiar and complicated set of facts impacting a single locality. Reflecting the unusual nature of both the language of Article 28 and the underlying material facts, no inconsistency with the precedents of this Court has been shown.

Given the fact that (at least) twenty two other states have enacted laws declaring English as their official language, if this issue is really as worthy of certiorari as the petitioners claim, other courts will consider the issue and provide this Court with a more complete record by which to consider the question. The absence of any litigation on this issue arising outside of Arizona when such laws have been on the books for years demonstrates the unique nature of Article 28 and its purely local impact. The petition merely seeks reversal of a narrowly tailored state court decision adverse only to petitioners and is thus inappropriate for certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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November 23, 1998

MOTION FILED
OCT 28 1998

(H)

No. 98-167

In The

Supreme Court of the United States

October Term, 1997

Arizonans for Official English and Robert D. Park,
Petitioners,

vs.

State of Arizona; Jane Dee Hull, Governor of Arizona; Grant Woods, Attorney General of Arizona; Armando Ruiz; Linda Aguirre; John Philip Evans; Rosie Garcia; Candido Mercado; Manuel Pena, Jr.; Peter Rios, Jr.; Macario Saldate IV; Federico Sanchez; and Victor Soltero
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF ARIZONA LEGISLATORS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Movants are seventeen members of the Arizona State Legislature, including the Speaker, former Speaker, Speaker *Pro Tempore*, and Majority Leader of the Arizona House of Representatives (a complete list is contained in the attached proposed brief). Although Counsel for the State and for Petitioners have consented to the filing of this brief, Counsel for the private Respondents, Stephen G. Montoya, refused consent.

Movants are interested in the decision in this matter both because of their own interest in proposing, debating and ultimately enacting or rejecting legislation in one common language (rather than having legislators propose, deliberate, and debate legislation in many languages), and because of their concern that the decision of the Arizona Supreme Court in this case will inevitably lead to increasing demands by government employees for costly multilingual services, not for the public good, but due to the employees' own personal beliefs and interests. Members of Congress, two other states, and several organizations have filed an *amici* brief in support of the Petition; Movants believe that it would assist the Court to hear also from Arizona elected representatives.

Now, therefore, Movants respectfully move the Court for leave to file the attached proposed brief *amicus curiae* in support of the Petition.

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Pursuant to Rule 37.3 of the Rules of this Court, *amici curiae* submit this brief in support of Petitioners.[1] Consent letters from counsel who have consented to the filing of this brief have been lodged with the Clerk of the Court.

I. INTEREST OF THE *AMICI*

The *amici curiae* are seventeen members of the Arizona State Legislature. The *amici* are: Speaker of the House of Representatives Jeff Groscost, Former Speaker Don Aldridge, House Majority Leader Lori Daniels, House Speaker *Pro Tempore* Joe Hart, Representatives Debra Brimhall, Robert Burns, Dean Cooley, Jake Flake, Linda Gray, Tom Horne, Marilyn Jarrett, Karen Johnson, Wes Marsh, Jean McGrath, Tom Smith, Lela Steffey, and Jim Weiers.

The *amici* are interested in the decision in this matter because they want to conduct the legislature's own collective acts and deliberations in one language as mandated by Article XX, Par. 8 of the Arizona Constitution. In particular, *amici* want the continued ability to propose, debate and ultimately, to enact legislation in one common language - the English language - rather than having legislators propose legislation, amendments, or resolutions in other languages. The *amici* are also concerned that a decision finding Article XXVIII unconstitutional might use sweeping language that would greatly expand the State's linguistic obligations and would detrimentally impact Arizona's future because of increased

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[1]No counsel for either party authored this brief *amici curiae*, either in whole or in part. Furthermore, no persons other than *amici curiae* (or counsel) contributed financially to the preparation of this brief.

financial obligations. Additionally, the *amici* believe that the legislative authority, and not government employees, should be able to determine the manner and message when the state government speaks. The *amici* submit this brief to inform the Court of concerns that are unique to the Arizona Legislature but which ultimately impact all Arizonans. Lastly, the *amici* are interested in supporting the People of Arizona who adopted Article XXVIII by a popular vote.

II. ARGUMENT

A. Decisions Finding Article XXVIII Unconstitutional Could Lead to Expanded State Obligations and the Subsequent Financial Burden to the State of Arizona Could Be Enormous.

The Arizona Supreme Court below stated:

> Significantly, in finding the Amendment unconstitutional, we do not hold, or even suggest, that any governmental entity in Arizona has a constitutional obligation to provide services in languages other than English, except, of course, to the extent required by federal law.

Ruiz v. Hull, 1998 WL 203081 *19 (Ariz. 1998) *Amici*, nevertheless, are concerned that the underlying rationale of that opinion and the opinion of the Ninth Circuit in Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995), vacated on remand, will inevitably lead to claims of constitutional rights to multilingual services unless this Court clarifies the law in this area to disallow such claims.

Amici respectfully request this Court to accept review in this case. A decision, like the one penned by the Ninth Circuit

en banc majority, could redefine the relationship between government employers and employees. The Ninth Circuit's *en banc* decision threatened to create new limitations on government speech. For example, citizens may claim the right to have legislative enactments and judicial opinions published in languages other than English. Legislators and constituents could claim a right to simultaneous multilingual translation of legislative hearings and debates. If languages other than English are required for use by government officials and employees, the burden to the State could be enormous. While the Respondents do not expressly contend that there will be an affirmative duty placed on the State to provide more effective government service by employing multilingual employees and translators, someone might try to expand a broadly-worded decision to argue for such a result. Such a decision could arguably create new expectations of receiving government services in many different languages. Providing vast new language services would be catastrophic to Arizona's financial health.

It is for just these reasons that courts, to date, have consistently chosen to refrain from requiring the government to provide assistance in languages other than English. Toure v. United States, 24 F.3d 444 (2d Cir. 1994)(no right to notice of administrative seizure in French); Soberal-Perez v. Heckler, 717 F.2d 36 (2d Cir. 1983) (no right to social security notices and services in Spanish and asserting, in dicta, that English is the national language of the United States); Guadalupe Org., Inc. v. Tempe Elementary School Dist. No. 3, 587 F.2d 1022, 1027 (9th Cir. 1978) (no right to bilingual education); Frontera v. Sindell, 522 F.2d 1215 (6th Cir. 1975) (no right to civil service carpentry exam in Spanish).

In addition to Arizona and numerous other State governments, the federal government has also recognized that the use of a common language, subject to constitutional constraints, is useful in minimizing expenditures for multilingual services. This is evidenced by the Sixth Circuit Court of Appeals' opinion in Frontera, where the court stated:

> Our national interest in English as the common language is exemplified by 8 U.S.C. §1423, which requires, in general, English language literacy as a condition to naturalization as a United States Citizen.
>
> Statutes have been enacted which provide exceptions to our nation's policy in favor of the English language to protect other interests and carry out the policies of the Fourteenth Amendment, but these exceptions do not detract from the policy or deny the interests the various levels of government have in dealing with the citizenry in a common language. Id. at 1220.

The precise concerns of the *amici* were expressed in Frontera v. Sindell, when the court stated, "In order to accommodate all nationality groups, the city might be compelled to establish a department of languages with a staff of linguists . . . ." (Id. at 1219). The *amici* are concerned that if the Court finds Article XXVIII unconstitutional, it will open the door for litigants to demand expanded language assistance obligations. Providing all government services in all of the languages spoken in Arizona would quite possibly lead to curtailed funding for existing substantive programs and agencies of government. These are legitimate choices for

the allocation of finite resources that the legislature makes in every budget. The legislature should be allowed to continue to make these policy decisions free from expensive mandates stemming from the state's own employees' claimed right to choice of language on the job.

B. The Initiative Process Deserves Great Deference Because the Mechanism Is Direct Rather than Representative.

The Arizona Constitution provides Arizona's citizens with the power to directly create law through the initiative process. Ariz. Const. art. IV, pt. 1, §§ 1-15. Legislative authority which is vested in its citizenry through the initiative process is a distinctive characteristic found only in twenty-four States.[2] Accordingly, this characteristic should be entitled to significant deference. Indeed, Arizona courts have been exceedingly reluctant to interfere with the initiative process. *See, e.g.*, Fairness and Accountability in Ins. Reform v. Greene, 180 Ariz. 582, 886 P.2d 1338 (1994); Tilson v. Mofford, 153 Ariz. 468, 737 P.2d 1367 (1987); Iman v. Bolin, 98 Ariz. 358, 404 P.2d 705 (1965); Adams v. Bolin, 74 Ariz. 269, 247 P.2d 391 (1952).

Courts have the authority to interpret the law created by the passage of an initiative, and the *amici* do not wish to suggest the contrary. Rather, the *amici* merely wish to indicate that the initiative power is the supreme method of

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[2]Tommy Neal, *The Voter Initiative*, National Conference of State Legislatures, Legis Brief, Vol. 1, No. 38, October 1993.

proposing legislation and amendments to the State Constitution. The Arizona Supreme Court has recognized the special significance of initiatives as reiterated by the appellate court in Turley v. Bolin, 27 Ariz. App. 345, 554 P.2d 1288, (1976) when the court noted that:

> [T]he provisions of the Arizona Constitution relating to the reservation by the people of initiative and referendum rights show:
> ' . . . beyond the possibility of contradiction that the people themselves deliberately and intentionally announced that, by its adoption, they meant to exercise their *supreme sovereign power* directly to a far greater extent than had been done in the past, and that the legislative authority, acting in a representative capacity only, was in all respects intended to be subordinate to direct action by the people. [Emphasis added.] Id. at 348, 554 P.2d at 1291.

Since the legislative process that was the source of Article XXVIII was direct and not representative, there can be no question as to the will of the Arizona electorate. This is an important issue on which the people have spoken. This Court should review the issue in light of this direct expression by the people and effectuate their will to the greatest extent possible.

III. CONCLUSION

For all the reasons stated in this brief, the *amici* respectfully urge that the Court grant the petition to review this case.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 2 1998
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(5)

No. 98-167

In The
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Arizonans for Official English and Robert D. Park,
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v.

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Respondents

On Petition for A Writ of Certiorari to the Supreme Court of the State of Arizona

Reply to Opposition to PETITION for Writ of Certiorari

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I. PETITIONERS HAVE STANDING TO MAINTAIN THIS ACTION.

Respondents ask the Court to deny the Petition because Petitioners Arizonans for Official English and Robert Park (together "AOE") do not have standing to maintain it. State Respondents' Brief in Opposition to Petition for Writ of Certiorari ("State Opp."), 1;[1] Private Respondents' Opposition to Petition ("Private Opp."), 3, n. 3. These requests should be denied and the Petition granted because:

- A) the circumstances which led the Court to question Petitioners' standing in *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1068 (1997) ("*AOE I*"), no longer apply; and,
- B) Petitioners have standing under this Court's decisions and Arizona law.

A) Petitioners Have Suffered Cognizable Injury As Defined in *Arizonans for Official English I*.

Petitioners' standing was challenged in *AOE I* because:

> As nonparties in the District Court, AOE's members were not bound by the judgment for Yniguez. That judgment had slim precedential effect . . . and it left AOE entirely free to invoke Article XXVIII, § 4, the citizen suit provision, in state court, where AOE could pursue whatever relief state law authorized.

117 S.Ct. at 1068.

None of those conditions are still true. Petitioners AOE

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[1]Respondents argued in *AOE I* that Petitioners did not have standing because they retained the right to sue in state court. *See, e.g.*, Brief for Respondents In Opposition to the Judgment, in *AOE I*, No. 95-974, 31. Now they argue that despite being bound in state court as well, Petitioners still have not suffered a cognizable injury. State Opp. 15.

and Park were parties throughout the state court proceedings; in fact, AOE and Park were the "primary litigating defendants" throughout this process. Pet. App. 55a.

As the State Respondents note, the judgment of the Arizona Supreme Court is binding on AOE, and prohibits AOE from invoking the citizen suit provision in state court: "Petitioners are bound by the Arizona Supreme Court decision and therefore precluded from bringing a private enforcement action pursuant to Section 4 of Art. XXVIII." State Opp., 13.

The invasion of a right to sue is well-recognized by this Court as sufficient for standing. For example, in *Primate Protection League v. Tulane Ed. Fund*, 500 U.S. 72, 77 (1991), the Court noted that "[p]etitioners' injury is clear, for they have lost the right to sue in Louisiana court - the forum of their choice." Similarly, the adverseness necessary for standing "is supplied not by petitioners' claims for the monkeys' protection, but rather by petitioners' desire to prosecute their claims in state court." 500 U.S. at 79.

Here Petitioners wish to prosecute their claims in Arizona state court, but cannot do so, solely because of an erroneous interpretation of federal law by the lower court. This loss of rights has an immediate impact on Petitioners. For example, Petitioners wish to sue the state over its failure to teach English to Arizona's children.[2] Park,

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[2]*See, e.g.*, Navarrette, "Bilingual Classes' Success Debated: Classes effective for only 2.8% of students," *The Arizona Republic*, June 4, 1998, A1 ("Fewer than 3% of students in Arizona's bilingual education classes are gaining the skills necessary to join students in mainstream classes, according to a report the Arizona Department of Education will release later this month."). Arizona's bilingual education failure rate is higher than that which caused

"Bilingual education is, in fact, illegal," *The* [Scottsdale, Ariz.] *Tribune*, August 20, 1998, A13 ("Arizona's law had ending bilingual education as one of its primary goals.").

Art. XXVIII's citizen suit provision would have given Petitioners an absolute right to challenge this failed policy. *Id.* It is important for Petitioners to have this right to sue directly, both because AOE's ability to sue under Ariz. Const. Art. XX, § 7 (schools conducted in English), is uncertain, and because parents and students who have challenged bilingual education programs have been harassed. *See, e.g., Carbajal v. Albuquerque Public School Dist.*, Civ. 98-0279-MVDIS (D. N.M. 1998) (protection sought after retaliation against students challenging schools' bilingual education policy).

Now, however, Petitioners and aggrieved parents who want their children to learn English must undertake another initiative. And this new initiative could be ignored by state officials, in an endless cycle.

Petitioners' injuries are immediate and concrete, rather than "abstract" as Respondents suggest. Thus, the Court's earlier concern about standing has been ameliorated in this proceeding.

B) Petitioners Have Standing Under This Court's Decisions and Arizona Law.

Respondents contend that Petitioners have suffered no injury, or that any injury is so general and indistinct that it can be ignored. Neither point is well-taken. Even leaving

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California's voters to largely eliminate bilingual education. *Id.*; *Valeria G. v. Wilson*, 12 F. Supp.2d 1007 (N.D. Calif. 1998) (refusing preliminary injunction against initiative because English language instruction was valid teaching method).

aside all the reasons for standing discussed in *AOE I*, *see, e.g.*, Reply Brief for Petitioners in No. 95-974, 13-18, AOE and Park have standing to maintain this case.

As noted above, this Court recognized the invasion of a choice of forum right as sufficient for standing in *Primate Protection League*. 500 U.S. at 77. This point is also made in *Diamond v. Charles*, 476 U.S. 54 (1986), where a doctor was found not to have standing to defend the constitutionality of a state abortion statute. In a footnote, this Court recognized that the invasion of statutorily-created rights could sustain standing to defend the constitutionality of a challenged state statute. 476 U.S. at 65, n. 17 ("The Illinois Legislature, of course, has the power to create new interests, the invasion of which may confer standing. In such a case, the requirements of Art. III may be met."). To suggest, as Respondents do, Priv. Opp. 3, n.3, State Opp. 15, n. 9, some distinction between state-created and "federal" rights for purposes of standing would conflict with this statement in *Diamond v. Charles*.

Even Respondents' citation to *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992), as claiming that a state cannot create general individual statutory rights which are vindicable in the federal courts, State Opp. 14-15, is an overstatement. *See, e.g.*, 504 U.S. at 578 (recognizing statutory rights). Justice O'Connor and two other Justices, concurring and citing *Director, OWCP v. Perini North River Associates*, 459 U.S. 297 (1983), anticipated this argument in *Diamond v. Charles* by noting that if the doctor had been a "proper party" in the court below, he could have maintained his case in this Court. In that case, however, "he asserts no actual, present interest that would **permit him to sue or be sued** by appellees, or the State of Illinois, or anyone else, in an action sharing common

questions of law or fact with those at issue in this litigation." *Diamond*, 476 U.S. at 77 (O'Connor, J., concurring) (emphasis added).

Petitioners had just such a right "to sue" the State in state court before the lower court decision, and have no such right today, solely as a result of the lower court decision. The citizen suit provision was included in Art. XXVIII precisely because the state was thought to be unwilling to actively enforce the new law - a concern recognized by the Ninth Circuit earlier in these proceedings. *Yniguez v. State of Arizona*, 939 F.2d 727, 733 (9th Cir. 1991) ("[A]s appears to be true in this case, the government may be less than enthusiastic about the enforcement of a measure adopted by ballot initiative."). The concern was well-grounded in fact, as the Governor, Attorney General and even the Council on Judicial Administration had all opposed the initiative. *See, e.g., id.*, and Petition, 10, n. 5; *LULAC v. Wilson*, 131 F.3d 1297, 1305 (9th Cir. 1997)(comparing California officials' enthusiasm for initiative with unwillingness of Arizona officials here).

Nor are the State Respondents' arguments about AOE's "general" injury convincing in light of this Court's recent jurisprudence. This type of citizen-standing right is well-recognized in Arizona, where "[c]itizens of the state may act for the benefit of the state as a whole." *Kadish v. Arizona State Land Dept.*, 747 P.2d 1183, 1197 (Ariz. 1987), *aff'd, ASARCO v. Kadish*, 490 U.S. 605 (1989); *Arnold v. Arizona Dept of Health Services*, 775 P.2d 521, 537 (Ariz. 1989).

As this Court noted in *Public Citizen v. Dept. of Justice*, 491 U.S. 440 (1989), the fact that many other citizens could sue upon being denied the same rights does not diminish the standing conferred by a petitioner's actual loss of a statutory

right. 491 U.S. at 449-50 ("The fact that other citizens or groups of citizens might make the same complaint after unsuccessfully demanding disclosure under FACA does not lessen appellants' asserted injury, any more than the fact that numerous citizens might request the same information under the Freedom of Information Act entails that those who have been denied access do not possess a sufficient basis to sue."). The difference which Respondents overlook is between an abstract injury and a concrete injury suffered by one who has lobbied for passage of a particular right in its favor, used the right, intended to use the right again, and has then lost that right to governmental action. *Clinton v. City of New York*, 118 S.Ct. 2091 (1998)(recognizing standing because complainant lobbied for a measure which was vetoed).

Whether or not other citizens could also invoke the citizen standing provision, Petitioners themselves are particularly bound by the lower court decision, and thus have lost a specific legal right intended to give them specific powers which they had used and were intending to use again. That is enough to give these Petitioners standing.

II. The Court Should Not Wait For Another Case to Consider These Important Constitutional Issues.

Respondents also suggest that "this case presents a particularly unsuitable vehicle for resolving the complicated First Amendment issues presented by Petitioners." State Opp. 15; Private Opp. 29. Oddly, this recommendation is supported by assertions both that "constitutional questions are inherent in the English-only concept . . . state constitutional issues will continue to influence the political discourse[,]" and that "premature review" won't provide "any substantial, corresponding benefit to the political

process." State Opp. 16, n. 10. These assertions are internally contradictory, and defy the reality of both the lower court decision and the political debate surrounding state choices of what language to use for internal activities.

The Arizona Supreme Court decision was based entirely on **federal** constitutional issues. There were no "state constitutional issues" in this or any other political debate over the language of government. Nor could there be in this case, since Art. XXVIII is itself an amendment to the Arizona Constitution.

This Court has a special responsibility when state courts misinterpret federal law in their consideration of state laws. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 152-53 (1984); *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). In *United Airlines v. Mahin*, 410 U.S. 623 (1973), for example, the Court sent a case back to a state court "to avoid the risk of 'an affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so.'" 410 U.S. at 632, *quoting, Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 443 (1952). Respondents' plea for inactivity would violate that responsibility to insure that state courts are fully informed about the correct understanding of this Court's decisions. So, too, the political process should not be distorted by supposedly authoritative but actually erroneous judicial descriptions of this Court's teachings.

Similarly, Respondents' plea ignores the effect the lower court decision has already had. At least one District Court has relied on the decision below to require a state government to use a language other than English to give drivers' license examinations. *Sandoval v. Hagan*, 7 F. Supp. 2d 1234 (M.D. Ala., 1998), *appeal filed*, July 23,

1998, No. 98-6598 (11th Cir.).[3]

In addition, contrary to the assertion that Art. XXVIII is a "uniquely restrictive state enactment," Private Opp. 29, Art. XXVIII is not the most detailed or restrictive official English statute. For example, voters in Alaska just adopted a new Official English initiative by a margin of 69% to 31%. URL://www.gov/state/ak/us/ltgov/elections/elect98/results.html. The Alaska initiative is modeled on Art. XXVIII and is even more detailed and specific (see Reply Appendix). URL://www.gov/state/ak/us/ltgov/elections/1998eop/98bal6.htm.

Nor is this case plagued by "the unusual nature of . . . the underlying material facts." Priv. Opp. 30. This case is a review of a summary judgment, in which the facts are both limited and clear. Petition App. 61a. This case is well-suited for immediate consideration by this Court.

III. The Private Respondents' Historical Analysis Is Incomplete and Inaccurate.

The private Respondents, as they did in *AOE I*, spend many pages describing their view of American history as it relates to government restrictions on and use of different languages. Priv. Opp. 5-29. Petitioners responded to the essentially identical material in *AOE I*, showing that Respondents' analysis was incomplete and inaccurate. *See, e.g.*, Reply to Opposition to Petition for Writ of Certiorari in No. 95-974, 6-8.

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[3]The State Respondents suggest that the Court await another case to determine these constitutional issues. State Opp. 15-16. This case has taken ten years to proceed, and there are no other such challenges to official English declarations in either state or federal courts. *Sandoval* is a challenge to a specific program.

As Petitioners noted then, "the Founders never intended the First Amendment to permit public employees to ignore Government's chosen language." *Id.*, 6. It would have been antithetical to the Founders' beliefs, following Hobbes and Locke, that language was the major organizing principle of states and without it "there had been amongst men, neither Commonwealth, nor Society, nor Contract, nor Peace." T. Hobbes, *Leviathan*, 12 (1973 ed.). In 1780, John Adams wrote the President of Congress, arguing that just as forms of government have an influence on language, so "language in its turn influences not only the form of government, but the temper, the sentiments, and manners of the people." John Adams, *The Works of John Adams*, Vol. 7, P. 249 (Charles Francis Adams, ed., 1852).

In fact, the Founders were generally advocates for English language usage. James Wilson's, December 11, 1787, speech to the Pennsylvania Ratifying Convention, demonstrates this view:

> That language, sir, which shall become most generally known in the civilized world, will impart great importance over the nation that shall use it. The language of the United States will, in future times, be diffused over a greater extent of country, than any other that we now know.

Library of America, "Debates on the Constitution," (1993), Vol. I, 866. *See, also, The Federalist, No. 2* (John Jay), 94 (Benjamin F. Wright ed., 1961).

To allow an individual employee to override a democratically-made choice of language for government would have ignored the natural course of American development and invited disaster. The Founders would not have done so.

CONCLUSION

For the reasons stated, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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December 2, 1998

FILED
AUG 27 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(6)

No. 98-167

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ARIZONANS FOR OFFICIAL ENGLISH, *et al.*,
Petitioners,

v.

STATE OF ARIZONA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Arizona

BRIEF OF WASHINGTON LEGAL FOUNDATION, THE CLAREMONT INSTITUTE FOR THE STUDY OF STATESMANSHIP AND POLITICAL PHILOSOPHY, THE ALLIED EDUCATIONAL FOUNDATION, 12 MEMBERS OF CONGRESS, AND THE STATES OF NEBRASKA AND ALABAMA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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25 pp

ADDITIONAL *AMICI CURIAE*

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

No. 98-167

ARIZONANS FOR OFFICIAL ENGLISH, *et al.*,
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v.

STATE OF ARIZONA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Arizona

BRIEF OF WASHINGTON LEGAL FOUNDATION, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with supporters in all 50 states.[1] WLF participates in litigation and administrative proceedings affecting the broad public

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

interest, and has a particular interest in opposing intrusions by the federal government into decisions about the operations of state governments, where those decisions are properly reserved to the states' citizens. In that regard, WLF has participated as a party or *amicus curiae* in numerous cases before this Court, as well as other courts across the country. WLF filed a brief before the Arizona Supreme Court below; before the U.S. Court of Appeals for the Ninth Circuit, sitting *en banc*, in *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), which also concerned the constitutionality of Arizona's Official English amendment; and before this Court on the petition for writ of certiorari and on the merits in *Arizonans for Official English v. State of Arizona*, 117 S. Ct. 1055 (1997) (hereinafter "*Yniguez*").

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a nonprofit educational and research institution founded in 1979 and based in Claremont, California. The Claremont Institute seeks a return of America's founding principles to their rightful preeminence in our public life. It agrees with our Founding Fathers that the citizenry's adherence to America's central principles, coupled with an enlightened public discourse, is essential to successful republican government. The Claremont Institute believes that both are threatened by the fragmentation inherent in multiculturalism and multilingualism, and that Official English provisions help preserve the language of our political and legal traditions as the common tongue of all Americans, regardless of their heritage. The Claremont Institute joined with WLF in its brief before the Arizona Supreme Court below and its brief on the merits before this Court in the *Yniguez* case.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as history, law, and public policy, and has appeared in *amicus curiae* before this Court in a number of cases of interest to the business community. AEF joined with WLF in its brief before the Arizona Supreme Court below.

United States Representatives Charles T. Canady, Bob Barr, Douglas Bereuter, Ken Calvert, Chris Cannon, John T. Doolittle, Bob Goodlatte, Asa Hutchinson, Bob Inglis, Peter King, Matt Salmon, and Bob Stump are Members of Congress who oppose the ruling of the Arizona Supreme Court below and who believe that it should be reversed. These Members are concerned by the decision's potential implications with respect to any future legislation on "Official English" by the states and by Congress, particularly in light of its resurrection of the Ninth Circuit's *en banc* opinion in the *Yniguez* case. They are also concerned by the implications for government operations generally of the holding that public employees have a presumptive right under the First Amendment to determine how and whether to comply with official directives concerning "expressive" job functions.

Rep. Charles T. Canady is chairman of the Subcommittee on the Constitution of the House Judiciary Committee.

The States of Alabama and Nebraska, like the State of Arizona, have provisions in their state constitutions declaring English to be the official language of the state. Ala. Const. amend. 509 (1990); Neb. Const. art. I, § 27. The States of Alabama and Nebraska are concerned about the

implications of the decision below for the validity of their own state constitutional provisions and any legislation or regulations adopted pursuant to them. Following Amendment 509, the Alabama Department of Public Safety adopted a policy requiring that driver's license examinations be administered solely in English. That policy was recently invalidated by a federal district court in an opinion which cited the Arizona Supreme Court's decision below. *Sandoval v. Hagan*, 1998 WL 295891, at *38, 73, 76 (M.D. Ala. June 3, 1998).

Amici believe that government policy, particularly in a diverse society such as ours, should promote the use of a common language. *Amici* further believe that it is desirable and constitutionally permissible for voters to determine that their government must act in that common language in most circumstances as a means of increasing government efficiency and furthering civic and social unity.

All parties have consented to the participation of the *amici*. Consent letters from counsel have been lodged with the Clerk of the Court.

SUMMARY OF ARGUMENT

This case presents the Court with an important opportunity to decide an issue of great and enduring national importance: whether the government may direct its employees to perform the government's official business exclusively in the English language. This Court recognized the suitability of this issue for review when it granted certiorari in the *Yniguez* case to review the six-to-five vote of a Ninth Circuit *en banc* panel striking down the Official English provision of the Arizona state constitution. The Court was unable to reach the merits of the decision in *Yni-*

guez because of mootness issues that required it to vacate the lower federal court decisions. The Arizona Supreme Court decision below, which is based solely on federal constitutional grounds, expressly follows the vacated Ninth Circuit decision, and raises the same purported First Amendment rights of public employees essentially to commit insubordination while on the job. This Court's definitive guidance on the application of its prior decisions continues to be needed in this controversial area. Because this case does not present the same mootness and standing issues that prevented the Court from reaching the merits before, it presents a suitable case for granting review.

The constitutional issues presented in this case are important far beyond the borders of Arizona: Official English provisions have been adopted by constitutional amendment or statute in many states, and bills to enact such legislation on the federal level have been before Congress. A decision by the Court in this case will not only eliminate uncertainty as to Official English provisions, but also will provide important direction to lower courts as to a variety of legal issues involving government policy on language. The Court should again take this opportunity to address the extent to which the U.S. Constitution constrains government action to preserve English as the nation's common and official language.

ARGUMENT

I. The Issues Presented by the Petition Are Matters of Great National Importance Deserving Review by this Court.

This Court should grant a writ of certiorari and review the decision below of the Arizona Supreme Court because

the case squarely presents an issue of great national significance: may the people direct their government to conduct its official business only in the people's common language? Regardless of one's position on the merits of that question, it is an issue that has been closely scrutinized, hotly debated, and frequently raised, and one that deserves this Court's review at this time and in this case. This Court recognized the importance of the issue when it granted certiorari to review the constitutionality of the very same Arizona constitutional amendment in the *Yniguez* case.

While the Court declined to address the merits in the *Yniguez* case after finding the case moot, the issue has not gone away. Rather, now more than ever it cries out for review. Relying solely on the First and Fourteenth Amendments to the U.S. Constitution, the Arizona Supreme Court held Article XXVIII of the Arizona Constitution to be invalid. Although this Court vacated the Ninth Circuit's and district court's rulings in the *Yniguez* case, the Arizona Supreme Court expressly relied on the Ninth Circuit's opinion. Pet. App. 7a n.1. Article XXVIII was adopted by a vote of the people of Arizona in 1988, and federal constitutional principles are still being invoked to thwart that decision of Arizona voters. This Court should grant review once again to redress that wrong.

The Arizona Official English constitutional provision at issue in this case is not a unique political phenomenon, and definitive resolution of the central issues may eliminate uncertainty as to constitutional constraints and obviate further costly litigation. Several states have adopted similar constitutional provisions; many more have adopted legislation to the same effect; and Official English bills and ballot propositions have been advanced in many others. *See* Pet. 26 n.8 (collecting citations). Contrary to the misapprehen-

sion of the Arizona Supreme Court, the Arizona provision is in no sense unique. Indeed, it has been the model for subsequent constitutional and legislative enactments,[2] and its detailed provisions will provide guidance to state legislatures and Congress in the enactment of statutes and regulations implementing what the Arizona Supreme Court deemed "merely symbolic" Official English provisions. Pet. App. 28a.

In addition, Congress has considered Official English constitutional amendments on at least three occasions in recent years.[3] Indeed, Congress has held hearings on several bills that would declare English the official language of the United States and require all functions of the federal government to be performed exclusively in English in most or all circumstances.[4] Many of these legislative actions have been prompted by national and state organizations committed to affirming the role of English as the common language of the United States, including U.S.

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[2] *E.g.*, 1995 N.H. Laws 157.

[3] Bills have been introduced in Congress in 1981, 1984, and 1988 to amend to the Constitution to make English the official language of the United States. *See* The English Language Amendment: Hearing on S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. (1984); S.J. Res. 13, 100th Cong., 1st Sess. (1987).

[4] *See* Making English the Official Language of the United States: Hearing Before the Senate Governmental Affairs Comm., 104th Cong., 1st Sess. (Dec. 7, 1995); S. 356, 10th Cong., 1st Sess. (introduced Feb. 6, 1995); H.J. Res. 109, 104th Cong., 1st Sess. (introduced Sept. 29, 1995); S. 175, 104th Cong., 1st Sess. (introduced Jan. 10, 1995); H.R. 1005, 104th Cong., 1st Sess. (introduced Feb. 22, 1995); H.R. 739, 104th Cong., 1st Sess. (introduced Jan. 31, 1995); H.R. 123, 104th Cong., 1st Sess. (introduced Jan. 10, 1995).

English, English Language Advocates, and petitioner Arizonans for Official English (AOE).

Nor is the Official English issue one of fleeting political significance. The end of the Cold War has seen the reemergence of cultural and linguistic units as powerful political forces around the world. The interaction between language and government, particularly the designation of certain languages as the official language of government, has become a fundamental regime question threatening the political integrity and stability of several nations, including the former Soviet Union and Canada.[5] The ongoing struggle to preserve the Canadian federation in light of linguistic differences will continue to fuel concerns about the possibility of similar strains in American society, which in turn will drive legal efforts regarding the official status of the English language.

This case poses most directly the question whether the government may require its employees to conduct official state business in a particular language. That issue, however, is closely related to several other issues of national importance and great concern, and a ruling by the Court in this case no doubt will provide guidance in related areas. Such related issues include whether there is a right to receive government services in languages other than

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[5] *See, e.g.*, Frank M. Lowrey, IV, Comment, *Through the Looking Glass: Linguistic Separatism and National Unity*, 41 Emory L.J. 223 (1992); Terrence Meyerhoff, Note and Comment, *Multiculturalism and Language Rights in Canada: Problems and Prospects for Equality and Unity*, 9 Am. U.J. Int'l L. & Pol'y 913 (1994); Kevin Sneesby, Comment, *National Separation: Canada in Context -- A Legal Perspective*, 53 La. L. Rev. 1357, 1358-59 (1993).

English;[6] whether private employers may require their employees to speak English during business hours;[7] whether the state may require private businesses to communicate certain messages (such as consumer product safety warnings) in languages other than English;[8] and whether linguistic skills may properly be considered in jury selection.[9] While different legal standards apply in many of these other contexts, as a practical matter there will no doubt be a substantial spillover effect from a decision by this Court in this case.

This Court's guidance on such issues is indispensable. The Arizona Supreme Court's ruling, like the Ninth Cir-

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[6] *See Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022 (9th Cir. 1978); *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973); *Toure v. United States*, 24 F.3d 444 (2d Cir. 1994); *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975); *Sandoval v. Hagan*, 1998 WL 295891 (M.D. Ala. June 3, 1998).

[7] *See Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 2726 (1994); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

[8] *See Stanley Indus. v. W.M. Barr & Co.*, 784 F. Supp. 1570 (S.D. Fla. 1992); *Ramirez v. Plough, Inc.*, 12 Cal. Rptr. 2d 423 (Ct. App. 1992), *rev'd*, 863 P.2d 167 (Cal. 1993); 40 C.F.R. § 156.206(e) (1993) (EPA regulation requiring Spanish-language warning statements in certain circumstances); 16 C.F.R. § 307.5 (1994) (FTC regulation requiring tobacco warnings to be in predominant language of non-English periodicals).

[9] *See Hernandez v. New York*, 500 U.S. 352 (1991); *Pemberthy v. Beyer*, 19 F.3d 857 (3d Cir.), *cert. denied*, 115 S. Ct. 439 (1994); *United States v. Ramos Colon*, 415 F. Supp. 459 (D.P.R. 1976).

cuit's 6-5 *en banc* decision on which it relied, turns in great measure on the interpretation and application of decisions by this Court, including not only its seminal decision on language rights in *Meyer v. Nebraska*, 262 U.S. 390 (1923), but also several recent decisions bearing on the First Amendment rights of public employees. Only this Court can give definitive instruction on the meaning and import of its prior decisions.

II. The Issue Is Ready for Review by This Court.

A. The Issues Are Ripe.

This case and the issue it presents are ripe for review by this Court. Not only the Arizona Supreme Court but also the Ninth Circuit among the Courts of Appeals has rendered a decision on the Arizona Official English provision, and it would be both unnecessary and unproductive for this Court to pass on this opportunity to hear this issue in order to allow the issue to percolate among the circuits and the state courts. Moreover, the Ninth Circuit has considered English-language-only rules for public employees in other cases as well.[10] Where the issue was of such pressing concern, this Court has accepted review without requiring consideration by multiple circuits or even

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[10] *See Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987); *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989); *id.*, 861 F.2d 1187, 1194 (9th Cir. 1988) (Kozinski, J., dissenting from denial of rehearing en banc); *Spun Steak*, 998 F.2d 1480; *id.*, 13 F.3d 296 (Reinhardt, J., dissenting from denial of rehearing en banc).

one circuit.[11] That the issues have been sufficiently raised and explored is confirmed not only by these decisions, but also by the extensive legal commentary and scholarship on Official English proposals that have been published over many years, and well as numerous analyses about related issues of language policy. *See* Brief of the Washington Legal Foundation, *et al.*, on Petition for Writ of Certiorari in *Yniguez* at 11-13 & nn.14-18, No. 95-974 (filed Jan. 22, 1996) (collecting citations).

B. This Case Is Procedurally Appropriate for Review.

This case is procedurally appropriate for review by this Court. The dispute is not fact-bound and requiring of further findings by the lower courts. The Arizona Supreme Court construed the Arizona constitutional provision on its face rather than as applied to the specific facts of respondents. This Court has a suitable opportunity to decide issues of great national importance; it should avail itself of that opportunity and grant the petition.

Moreover, this case does not present the issue of mootness that prevented the Court from reaching the merits in *Yniguez*, nor the concerns about petitioners' standing that the Court raised but did not resolve in its opinion in that case. *Yniguez*, 117 S. Ct. at 1067-75. As to mootness, unlike Maria-Kelley F. Yniguez, the plaintiffs below were and remain four elected officials, five state employees, and one public school teacher. Pet. App. 11a. As a result,

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[11] *See, e.g., Mistretta v. United States*, 488 U.S. 361, 362 (1989) (granting certiorari before judgment in the Eighth Circuit in order to consider constitutional issues).

they continue to be subject to the provisions of Article XXVIII.

Similarly, this case does not raise the same concerns about petitioners' standing that *Yniguez* did. With respect to the Official English provision, the people of Arizona vested in themselves not only a share of the legislative power through the initiative process, Ariz. Const. art. IV, pt. 1, but also a share of the executive power of enforcement. Section 4 of Article XXVIII, entitled "Enforcement; Standing," provides that "[a] person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State." *Id.; see Yniguez*, 117 S. Ct. at 1068 ("Article XXVIII's citizen suit provision . . . authorizes suits to enforce Article XXVIII in state court"). Arizona courts have recognized that where a statute provides for citizen enforcement, "[c]itizens of the state may act for the benefit of the state as a whole" under the "private attorney general" doctrine. *Kadish v. Arizona State Land Dep't*, 747 P.2d 1183, 1197 (Ariz. 1987), *aff'd, ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989); *see Arnold v. Arizona Dep't of Health Servs.*, 775 P.2d 521, 537 (Ariz. 1989) (applying doctrine).

The Ninth Circuit recognized that compelling logic behind vesting such enforcement authority in private attorneys general as well as in constituted officers of government. "[A]s appears to be true in this case, the government may be less than enthusiastic about the enforcement of a measure adopted by ballot initiative." *Yniguez v. State of Arizona*, 939 F.2d 727, 733 (9th Cir. 1991). The same concern about public officials' indifference that drives the initiative process also drives the concern for alternative means of enforcement: "While the people may not always be able to count on their elected

representatives to support fully and fairly a provision enacted by ballot initiative, they can invariably depend on its sponsors to do so." *Id.*

Thus, petitioners have standing to enforce the Official English amendment in Arizona state courts, out of which this petition arises. The decision of the Arizona Supreme Court below, which struck down the Official English amendment in its entirety under the federal constitution, nullified the state constitutional right of petitioners to seek enforcement of the Official English amendment in the state courts. This case is wholly unlike *Yniguez*, where petitioners challenged the federal district court and Ninth Circuit rulings that invalidated Article XXVIII. This Court expressed concern about petitioners' standing in that case because, "[a]s nonparties in the District Court, AOE's members were not bound by the judgment for Yniguez," and the federal district court "judgment had slim precedential effect, . . . [leaving] AOE entirely free to invoke Article XXVIII, § 4, the citizen suit provision, in state court, where AOE could pursue whatever relief state law authorized." 117 S. Ct. at 1068; *see also id.* at 1064 n.11 (concerning whether the lower federal courts' decisions were "binding precedent on Arizona's judiciary"). By contrast, petitioners were parties to all stages of the proceedings below, and the Arizona Supreme Court's application of federal constitutional principles is fully binding on any further attempts at enforcement in state court. Indeed, any attempt by petitioners to enforce Article XXVIII in state court would expose them to liability for sanctions in light of the Arizona Supreme Court's decision. *See* Ariz. Rev. Stat. § 12-341.01(C); Ariz. R. Civ. P. 11(a).

This Court has recognized in similar circumstances that parties in petitioners' position have standing to seek review

by this Court of an adverse state court ruling based on federal law. *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989). The Court noted that even if the parties in *ASARCO* would not have had standing under federal requirements to bring the action in the federal courts in the first instance, "[a]t this juncture, petitioners allege a specific injury stemming from the state-court decree, a decree which rests on principles of federal law." *Id.* at 617. The Court agreed with the petitioners in *ASARCO* that, "as a result of the state-court judgment, the case has taken on such definite shape that they are under a defined and specific legal obligation, one which causes them direct injury." *Id.* at 618. Here, as in *ASARCO*, "[t]he state proceedings ended in a declaratory judgment adverse to petitioners, an adjudication of legal rights which constitutes a kind of injury cognizable in this Court on review from the state courts." *Id.*

As the result of the Arizona Supreme Court's ruling, petitioners "are faced with 'actual or threatened injury' that is sufficiently 'distinct and palpable' to support their standing to invoke the authority of a federal court." *Id.* The Ninth Circuit recognized in the *Yniguez* case that AOE and its members are more than mere "'concerned bystanders,' who will use [the appeal] simply as a 'vehicle for the vindication of value interests.'" *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)); *see Yniguez*, 939 F.2d

at 732.[12] AOE and Robert Park were the principal sponsors of the ballot initiative on Article XXVIII, and they have intervened or sought to intervene in all but one of the ten proceedings that have ever been held on Article XXVIII. Indeed, the Ninth Circuit noted that AOE and Park did not intervene in the sole exception – the district court proceeding in *Yniguez* – "only because they had been expressly assured by the Attorney General that he would vigorously represent their interests." *Yniguez*, 939 F.2d at 734.

Thus, the Ninth Circuit recognized, as matter of fact, that petitioners here not only had a right to enforce Article XXVIII, but also had expressed "their intention to see Article XXVIII enforced against Yniguez." *Id.* As a consequence, there was a "more than speculative threat that Park was about to bring an action to enforce Article XXVIII" when the federal declaratory judgment action was filed nearly a decade ago. *Id.* at 734. This Court has found standing in similar circumstances where the peti-

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[12] Article XXVIII's express grant of standing to petitioners to enforce the constitutional provision in state court makes their standing distinct from that of the physician in *Diamond* whose "personal and professional interests" disposed him in favor of the abortion restrictions at issue. 476 U.S. at 66. The Court noted that the "Illinois Legislature, of course, has the power to create new interests, the invasion of which may confer standing. In such a case, the requirements of Art. III may be met." *Id.* at 65 n.17; *see also id.* at 77 (O'Connor, J., concurring) ("Dr. Diamond simply has no claim or defense in this sense; he asserts no actual, present interest that would permit him *to sue or be sued* by appellees, or the State of Illinois, or anyone else, in an action sharing common questions of law or fact with those at issue in this litigation.") (emphasis added). Here, petitioners do have the right to sue to enforce Article XXVIII, a right nullified by the state court decision below.

tioners' interest was based on a likelihood of their future actions rather than a "certainty," because the probability of their future conduct gave them "a sufficient stake in the outcome of the controversy to afford them standing to appeal." *Bryant v. Yellen*, 447 U.S. 352, 367-68 (1980). Thus, petitioners here have shown "a 'personal stake' in having an actual injury redressed rather than an 'institutional injury' that is 'abstract and widely dispersed.'" *Clinton v. City of New York*, 118 S. Ct. 2091, 2099 (1998) (quoting *Raines v. Byrd*, 117 S. Ct. 2312, 2322 (1997)). Unless this Court grants certiorari to review the decision below, it is difficult to discern how any party will ever be able to obtain review of the state court's invalidation of Article XXVIII on the basis of federal law.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to the Supreme Court of Arizona and review the decision of that court.

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Date: August 27, 1998